

# LIBEL TOURISM

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HEARING  
BEFORE THE  
SUBCOMMITTEE ON  
COMMERCIAL AND ADMINISTRATIVE LAW  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED ELEVENTH CONGRESS  
FIRST SESSION

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FEBRUARY 12, 2009

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## LIBEL TOURISM

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THURSDAY, FEBRUARY 12, 2009

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COMMERCIAL  
AND ADMINISTRATIVE LAW,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 11 a.m., in room 2141, Rayburn House Office Building, the Honorable Steve Cohen (Chairman of the Subcommittee) presiding.

Present: Representatives Cohen, Johnson, Franks, and Coble.

Staff present: Matthew Wiener, Majority Counsel; Richard Hertling, Minority Counsel; and Adam Russell, Majority Professional Staff.

Mr. COHEN. This hearing of the Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, will now come to order.

Without objection, the Chair will be authorized to declare a recess of the hearing, and I suspect I will, as we have a special program honoring the 16th President of the United States at about 11:30. So, we are going to break at some point for that, and then come back and finish up.

I will now recognize myself for a short statement.

Last year, I introduced, and the House passed under suspension of the rules, H.R. 6146 to protect Americans' first amendment rights against the threat posed by libel tourism. We return to that subject matter today.

Libel tourism is the name given to the practice of end running the first amendment by suing American authors and publishers for defamation in the courts of certain foreign countries. These countries have laws that often disfavor speech critical of public figures, countries with often little or no connection to the allegedly defamatory statements that gave rise to the suits.

England has become the favorite destination of libel tourists from around the world, especially wealthy libel tourists from countries whose own laws are hostile to free speech. London has been called the libel capital of the world.

England's otherwise admirable legal system attracts libel tourists for several reasons. Let me touch on the main one by way of introduction of the subject of today's hearing.

Our Constitution's first amendment usually requires a defamation plaintiff to prove the falsity of a challenged statement. The first amendment is even more demanding when the defendant is a

public figure—*The New York Times*, et cetera. The plaintiff must then prove actual malice—prove that the defendant made the defamatory statement, in the words of the U.S. Supreme Court, with “knowledge that it was false or with reckless disregard as to whether it was false or not.”

Not so under the English defamation laws. Under English laws, presume the defendant is wrong. It places the burden of proving the truth of an allegedly defamatory statement onto the defendant.

This draconian feature of English law—a long way from the Magna Carta—has drawn criticism, not only from defenders of free speech in the U.S., but also from the United Nations, and even members of the U.K.’s own Parliament.

The threat of English and other foreign defamation suits by libel tourists has not diminished since we introduced H.R. 6146. If anything, it has grown, and is likely to grow stronger as the Internet continues to facilitate the free flow of information across national boundaries.

Today’s hearing will give Members of the Subcommittee the opportunity to address four main issues.

First, what features of some foreign legal systems—especially England’s—attract libel tourists?

Second, how prevalent is libel tourism? Who are the libel tourists, and who are their American victims?

Third, does libel tourism threaten the first amendment rights of Americans? And if it does, how and with what effect on public discourse about important matters of public concern?

And finally, what should Congress do about libel tourism?

As I mentioned in my earlier remarks, we passed this bill in the House. And the Senate never addressed it.

To help us address these important and timely questions, we will hear from four distinguished witnesses.

Our first witness will be Rachel Ehrenfeld, an author whose ordeal with libel tourism has helped bring this issue to the public’s attention.

Then Laura Handman and Bruce Brown, two prominent Washington media lawyers, who will testify about matters concerning the threat of libel tourism.

Finally, Professor Linda Silberman of the NYU School of Law—one of the country’s foremost experts on the enforcement of foreign legal judgments in our courts—will continue our discussion and hopefully suggest possible next steps.

So, we have comity—not the Bob Hope variety, but the legal kind—and threats to the first amendment.

Accordingly, I look forward to receiving today’s testimony. And I now recognize my colleague, Mr. Franks, the distinguished Ranking Member of the Subcommittee, for his opening remarks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And Mr. Chairman, I sincerely appreciate you conducting this hearing. This is an important subject.

Libel tourism is a specialized category of international forum shopping, which is the deliberate selection of a court that is known to rule favorably on a plaintiff’s position. A typical scenario involves an author who writes a critical news story about a social or legal problem.

As part of that story, the author exposes the illicit activity of an individual or group, possibly a person with an existing public profile—imagine that—seeking retribution against the author that the person or group files a defamation lawsuit in a forum known for its weak free speech laws.

The plaintiff in this scenario is not really interested in obtaining a judgment to collect damages. Instead, the plaintiff's main goal is to dissuade anyone from researching and publishing other negative accounts about his or her activities.

One of the witnesses today, Rachel Ehrenfeld, has experienced this first hand. In her book, "Funding Evil," Ms. Ehrenfeld indicts the activities of Saudi billionaire, Khalid bin Mahfouz, for allegedly erecting a bank system and fraudulent charitable groups that fund the activities of Osama bin Laden and other terrorists.

Although the book was published in New York, 23 copies were sold in Great Britain through Amazon.com, and the first chapter was accessible online internationally. Bin Mahfouz sued Ms. Ehrenfeld in London for defamation. She did not appear to contest the court's jurisdiction or the merits of the suit, and lost on summary judgment the following year.

The British court awarded \$225,000 in damages to bin Mahfouz, and ordered Ms. Ehrenfeld to apologize and destroy remaining copies of her book.

Bin Mahfouz chose Great Britain to file a lawsuit because he knew British libel laws provide weak protection for free speech, relative to the United States. Since he could not win where the book was written and published, he manipulated the British legal system to serve his own purposes.

Following the litigation in Federal and State court to declare the verdict unenforceable, the New York legislature passed the Libel Terrorism Protection Act in 2008. This statute provides that a foreign defamation judgment against a New Yorker will not be recognized unless the law applied in the foreign court provides as much protection for freedom of speech as the U.S. and the New York law.

Interested parties, including Members of this Subcommittee, believe that other States and the Federal Government should follow New York's lead. If libel tourism is an ongoing threat to free speech, a more comprehensive response is needed.

Last year, the House passed H.R. 6146, Chairman Cohen's libel tourism bill, which I co-sponsored. Under the Chairman's bill, no U.S. or State court may recognize or enforce a foreign defamation judgment regarding a public figure or public controversy, unless the foreign judgment is consistent with the first amendment in our Constitution. This dovetails with U.S. law, which generally denies enforcement of foreign judgments that are counter to State public policy.

Other legislators and observers prefer a different approach, as reflected in bills introduced by Representative King of New York and Senator Specter of Pennsylvania. The distinguishing feature of their legislation is the creation of a new Federal cause of action link to the foreign defamation suit. Once the foreign plaintiff files a defamation action against an American defendant in a foreign court, the American citizen may then sue in U.S. district court, if the foreign suit does not constitute defamation under U.S. law.

Injunctive relief, compensatory damages and attorneys' fees are available as remedies. Treble damages may be given, if the foreign litigant intentionally engaged in a scheme to suppress first amendment rights by discouraging publishers, or similar financial supporters, not to endorse the work of journalists, academics or other commentators.

Now, we all want to support a response that does the best job of frustrating libel tourists. But in our efforts to craft such a legislation, we must be careful not to overreach.

For example, legislation that creates a new Federal cause of action must comport with the Constitution guarantee of due process. We should not write a bill that allows a U.S. court to acquire jurisdiction over a foreign citizen, based exclusively on his decision to file a defamation suit against an American citizen in a foreign court. There must be greater legal contacts between the foreign litigant and the United States.

These are issues that we should explore today, Mr. Chairman. We have a panel of witnesses who are well versed on the subject of free speech procedure and conflict of laws. I am confident that they will add their understanding of the subject matter.

And Mr. Chairman, if libel tourism spreads, free speech will inevitably be muted. Journalists and publishers will be less willing to report on important and controversial stories that inform the public and inspire government action where appropriate.

Founding Father Thomas Paine once said, "Those who expect to reap the blessings of freedom must undergo the fatigues of supporting it." And that is our charge today. We must continue to support free speech by combating libel tourism.

So, before I conclude, Mr. Chairman, I want to mention a related issue. In many other countries, there is little distinction made between defamation of an individual and defamation of an ideology or religion. Other nations do not have the same high respect for their freedom of speech that we have in the United States, and it is important that we protect Americans from any defamation judgment that uses standards that do not comport with our own.

For example, many foreign governments have justified restrictions on freedom of speech or expression through blasphemy and religious defamation laws.

One prominent example is that of Egyptian blogger, Abdel Karim Suleiman Amir, who was sentenced to 4 years in prison for criticizing President Mubarak and offending the religion of Islam.

Similarly, author Mark Steyn faced charges of offending Canadian Muslims for an article from his book, "America Alone," that Maclean's Magazine published last year.

The movement for greater restrictions on freedom of speech or expression to protect religions rather the rights of individuals is one of the greatest threats to human freedom at this time, both internationally and in the United States, and one which shows how critically important it is that we look at the problem of libel tourism today. We must remain vigilant to protect Americans from any foreign defamation judgments.

And thank you, Mr. Chairman, for your patience here, and I look forward to the witnesses' testimony.



Mr. COHEN. I thank the gentleman for his statement. This is an ideal time and opportunity—and we had found it last year—for bipartisanship. So, unlike the vote we will probably take later today, we will have a good mix of blues and reds being all blues—or greens, or whatever.

All Members shall have the opportunity to enter a statement, and opening statements will be included in the record.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

I am pleased that Chairman Cohen has scheduled this hearing on what has come to be called “libel tourism.”

Let me just make three quick points:

First, libel tourism threatens the First Amendment rights of Americans to speak on matters of public concern.

News web sites and internet book sales that can send published materials around the world dramatically increase the danger of being sued in a foreign court over something published in the United States.

We’ll hear about one such instance today in which the subject of the publication was financing terrorism.

My hope is that this hearing will help lay the groundwork for a bipartisan bill.

Second, I believe the best starting point for such a bill in this Congress is Chairman Cohen’s H.R. 6146 from the last Congress, which I was pleased to co-sponsor.

That bill would impose a limited—but critical—requirement on those who ask a U.S. court to enforce a foreign defamation judgment arising from speech on a matter of public concern: to prove that the foreign judgment is consistent with the First Amendment.

And it would do this without interfering with the legal systems of other countries.

Third, I look forward to hearing insights from the legal experts at today’s hearing about the problem of libel tourism and what revisions, if any, should be made to H.R. 6146 before it is reintroduced.

Thank you, Chairman Cohen.

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Mr. COHEN. And I think Mr. King had a statement, who was going to be a witness. And without objection, we will have that entered into the record.

[The prepared statement of Mr. King follows:]

PREPARED STATEMENT OF THE HONORABLE PETER KING, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF NEW YORK

Chairman Cohen, Ranking Member Franks, and Members of the Subcommittee on Commercial & Administrative Law:

Thank you for the invitation to testify this morning regarding the critical issue of libel tourism. This is a very timely hearing and I appreciate, Mr. Chairman, your interest in the subject. This is an issue on which we worked together last Congress and I look forward to working with you again to finally resolve the despicable practice of libel tourism. Let me also take this opportunity to thank you, Chairman Cohen, for inviting Dr. Rachel Ehrenfeld to appear here today. I don't think you could have chosen a better witness to testify first-hand on how libel tourism is affecting American journalists.

Let me begin by stating the main threat posed by libel tourism is not just the clever exploitation of foreign courts' libel laws to win financial judgments against American authors. It's not even the risk that Americans are losing their First Amendment guarantee of freedom of speech (although that is quite troubling). The danger is that foreign individuals are operating a scheme to intimidate authors and publishers from even exercising that right. And it's actually scarier because, in many of these cases, the journalists are trying to write on topics of national and homeland security. Therefore it is imperative that Congress address the issue and pass legislation to stop this nefarious activity at once.

The issue of "libel tourism" threatens not only Americans' First Amendment freedom of speech but also their ability to inform the general public about existential threats; namely, the identity of terrorists and their financial supporters. As the Ranking Member of the Committee on Homeland Security, it is my duty to oversee policies for protecting our nation from potential terrorist attacks—a charge I take very seriously. I receive regular classified briefings on dangerous plots to attack the United States so I know just how grave these threats are. We cannot allow foreigners the ability to muzzle Americans for speaking the truth about these dangers!

Libel tourism is a recent phenomenon in which certain individuals attempt to obstruct the free expression rights of Americans (and the vital interest of the American people) by seeking out foreign jurisdictions ("forum shopping") that do not provide the full extent of free-speech protection that is enshrined in our First Amendment. Some of these actions are intended not only to suppress the free speech rights of journalists and others but also to intimidate publishers and other organizations from disseminating or supporting their work.

Unlike in the United States where the burden of proof is on the plaintiff to show that the publication was not only false but also malicious, in countries such as the United Kingdom it is actually the reverse. And some of these "tourists'" claims of jurisdiction are tenuous at best. In many cases, not only are none of the individuals (author, litigant, or publisher) associated with the case living in the venue of jurisdiction, but the books aren't even published there. These "libel tourists" stretch the law by claiming a handful of copies of the book purchased over the internet and delivered to an address in a foreign country gives them standing.

Since the burden of proof is on the author in the United Kingdom, the author must then hire an attorney, travel to the foreign country, and defend herself or likely face a default

judgment. Consequences include, but are not limited to, stiff fines, outrageous public apologies, the removal of books from bookstores and libraries, or even their destruction.

We cannot change another country's (libel) laws, nor would we want to. We must respect their laws, as they ought to respect ours. However, we cannot allow foreign citizens to exploit these courts to endanger Americans' First Amendment protected speech; especially, when the subject matter is of such grave importance as terrorism and those who finance it.

Just to be clear, we're not talking about journalists who carelessly or maliciously slander an individual. In this case we're talking about authors who, after conducting exhaustive research and carefully sourcing their work, are providing us glimpses into a dark and secretive world. We ought to rely on a variety of sources for this information and we cannot allow foreign litigants or foreign courts to tell us what can be written or published in the United States. That is a dangerous path we do not want to follow.

Some of the plaintiffs bringing such suits are intentionally and strategically refraining from filing their suits in the United States, even though the speech at issue was published in the United States, to avoid the First Amendment protections that Americans enjoy.

But this issue is also very troubling for the authors, journalists, and even publishers who attempt to write on these subjects. Already we have seen examples of authors having difficulty getting their articles or books published because publishers fear of being sued overseas. Some companies have even gone as far as to pay large settlements at the mere threat of legal actions. So not only are authors being injured for the works they have previously written but they and their publishers are being intimidated from writing future articles on these important topics. The free expression and publication by journalists, academics, commentators, experts, and others of the information they uncover and develop through investigative research and study is essential to the formation of sound public policy and thus the security of Americans.

In turn, the American people are suffering concrete and profound harm because they, their representatives, and other government policymakers rely on the free expression of information, ideas, and opinions developed by responsible journalists, academics, commentators, experts, and others for the formulation of sound public policy, including national security policy.

Having said that, the United States respects the sovereign right of other countries to enact their own laws regarding speech, and seeks only to protect the First Amendment rights of Americans in connection with speech that occurs, in whole or part, in the United States.

That is why last year I introduced the Free Speech Protection Act (**H.R. 5814**) to defend U.S. persons who are sued for defamation in foreign courts. This legislation would allow U.S. persons to bring a federal cause of action against any person bringing a foreign libel suit if the writing did not constitute defamation under U.S. law. It would also bar enforcement of foreign libel judgments and provide other appropriate injunctive relief by U.S. Courts if a cause of action was established. **H.R. 5814** would award damages to the U.S. person who brought the action in the amount of the foreign judgment, the costs related to the foreign lawsuit, and the harm caused due to the decreased opportunities to publish, conduct research, or generate funding.

Furthermore, it would award treble damages if the person bringing the foreign lawsuit intentionally engaged in a scheme to suppress First Amendment rights. It would allow for expedited discovery if the court determines that the speech at issue in the foreign defamation action is protected by the First Amendment.

Nothing in this legislation would limit the rights of foreign litigants who bring good faith defamation actions to prevail against journalists and others who have failed to adhere to standards of professionalism by publishing false information maliciously or recklessly. The Free Speech Protection Act does, however, attempt to discourage those foreign libel suits that aim to intimidate, threaten, and restrict the freedom of speech of Americans. I am proud to have worked closely with Sens. Arlen Specter and Joe Lieberman who introduced companion legislation in the Senate.

The King/Specter/Lieberman legislation also has the backing of various organizations including the Association of American Publishers, College Art Association, Anti-Defamation League, American Jewish Congress, American Library Association, 9/11 Families for a Secure America, American Booksellers Foundation for Free Expression, and the American Civil Liberties Union. At this time, I would respectfully request these endorsement letters be placed in the record. In addition, various columnists and editorial boards have written in support of our approach including Floyd Abrams, Andrew McCarthy, the *New York Times*, *New York Post*, and the *Washington Times*. I ask that these articles be placed in the record as well.

The impetus for a federal law is the case of Dr. Rachel Ehrenfeld, a U.S. citizen and Director of the American Center for Democracy. Dr. Ehrenfeld's 2003 book, "Funding Evil: How Terrorism is Financed and How to Stop it," which was published solely in the United States by a U.S. publisher, alleged that a Saudi Arabian subject and his family financially supported al-Qaeda in the years preceding the attacks of September 11, 2001. He sued Dr. Ehrenfeld for libel in England because under English law, it is not necessary for a libel plaintiff to prove falsity or actual malice as is required in the U.S. After the English court entered a judgment against Dr. Ehrenfeld, she sought to shield herself with a declaration from both federal and state courts that her book did not create liability under American law, but jurisdictional barriers prevented both the federal and New York State courts from acting. Reacting to this problem, the Governor of New York, on May 1, 2008, signed into law the "Libel Terrorism Protection Act", commonly known as "Rachel's Law."

In September, I supported and the House passed **H.R. 6146**, legislation sponsored by Chairman Cohen, to prohibit U.S. Courts from enforcing these outrageous defamation suits. However, I respectfully believe this bill does not go far enough to combat the threat of libel tourism. Foreign litigants will still be allowed to file these libel suits overseas with no worry of being countersued here in the U.S. If this bill were to be signed into law, the litigants would never see a dime of the judgments they are awarded, but it's not money they are after in the first place. They want a settlement or default judgment. They want the publicity, an apology, and they want these books to disappear. Most of all they want to intimidate authors and publishers.

As I said in my statement in support of Chairman Cohen's libel bill last year, I believe any libel tourism bill should include punitive measures to discourage these ridiculous lawsuits from being filed in the first place.

It is my hope, Mr. Chairman, that during this new Congress we can work together to introduce a bill that would solve this problem once and for all, legislation which would not only ban the enforcement of these foreign libel judgments but would also create a federal cause of action allowing American authors and journalists to sue those foreign plaintiffs here in the United States. This should be the essential component of any libel tourism bill. The real issue here is not the judgment or even the libel case itself. Rather, it is the attempt by certain individuals to muzzle those who dare speak out about terrorism and the financiers of it. Lawyers are cleverly exploiting foreign libel laws not only to injure American authors and publishing companies, but more importantly to shut them up. And it is working. But we must stop it!

Thank you for the opportunity to testify before at this hearing today. I look forward to answering any questions you may have.

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Mr. COHEN. Now, I am pleased to introduce the witnesses for today's hearing.

The first witness is Ds. Rachel Ehrenfeld. As mentioned in the opening statement, she has been a subject—or an object—of libel tourism. She is the director of the New York-based American Center for Democracy and the Center for the Study of Corruption and the Rule of Law; the author of “Funding Evil, How Terrorism is Financed and How to Stop It,” “Evil Money” and “Narcoterrorism.”

Dr. Ehrenfeld is an authority on the shadowy movement of funds through international banking and governments to fund terrorism—assuming that monies are still traveling through banking.

She explores the challenges of economic warfare and international terrorism to democracy and freedom, and how money laundering and political corruption facilitates terror financing and economic tourism. She has authored hundreds of articles about these issues.

She has testified before congressional Committees, as well as the European and Canadian parliaments on similar jurisdiction, provided evidence to the British Parliament and consulted with government agencies, such as the Department of Defense, Homeland Security, Treasury, Justice and the CIA. She has also organized and participated in conferences the world over, and is a member of the board of directors of the Committee on the Present Danger.

Our second witness will be Mr. Bruce Brown. Mr. Brown is a former newsroom assistant to David Broder at *The Washington Post*, and Federal court reporter for *The Legal Times*. He joined the firm of Baker and Hostetler in the summer of 1997. Since then, he has worked primarily in the areas of libel defense, prepublication review, news-gathering, copyright and civil rights. He regularly assists the Society of Professional Journalists on freedom of information matters.

In the area of prepublication review, he has worked on biographies of Supreme Court Justice Thurgood Marshall, former New York Mayor Rudy Giuliani—and imagine—musician John Lennon. His published work has appeared in *The Washington Post*, *The American Lawyer*, *The Economist*, *The Legal Times* and *The Wall Street Journal*, and has been interviewed on NPR and Court TV.

Ms. Laura Handman will be the third witness. She is the co-chair of the Davis Wright Tremaine appellate practice, concentrates on media, intellectual property law, provides prepublication counseling and litigation services from complaint through trial and appeal to U.S. and foreign book, magazine, newspaper and electronic publishers and broadcasters.

She has extensive experience in libel and privacy matters and brings recognized expertise to clients in array of copyright, trademark and first amendment issues. Also been on the America Radio Network. Her clients include the America Radio Network, Amazon.com, BBC, CNN, *The Economist*, FOX Television Stations, Inc., HarperCollins and the Random House.

And our final witness is Ms. Linda Silberman. Professor Silberman joined NYU's School of Law faculty in 1971. First woman to receive a full-time tenure track appointment to the School of Law and the first woman tenured professor, full professor, at NYU

School of Law when she received tenure in 1977. She was named the Martin Lipton Professor of Law in 2001.

Professor Silberman has approached all the subjects she teaches as a blend of the practical and the academic. Whether it is civil procedure, conflict of laws, family law or international litigation, she brings to the classroom her private practice background, her experience as an appellate lawyer, as a professor in residence at the Justice Department's Civil Division appellate staff, and her role as a special referee expert and consultant in a number of leading cases.

She has participated in various State Department study groups, including the Hague Conference on choices of law applicable to international sales, the proposed Hague Convention on Jurisdiction and Judgments, and the Hague Convention on Choice of Court Agreements.

So, as you can see, we have a very distinguished panel. We appreciate the willingness of all of you to participate in today's hearing.

Without objection, your written statements will be placed in the record, and we ask that you limit your oral remarks to 5 minutes. We have got a lighting system. And when it gets to yellow, you have a minute left. And then at red, Beulah pushes the buzzer, and you are off.

After each witness has presented his or her testimony, Subcommittee Members will be allowed to ask questions, subject to the 5-minute limit.

**TESTIMONY OF RACHEL EHRENFELD,  
AMERICAN CENTER FOR DEMOCRACY**

Ms. EHRENFELD. Thank you, Mr. Chairman and Members of the Committee for holding this hearing on libel tourism, which affects me personally. Special thanks to Mr. Cohen for inviting me.

Sitting at my desk on January 23, 2004, I was interrupted by an e-mail from a law firm in London. This was no ordinary message. It was a letter threatening to sue me for libel in a British court for statements made in my book, "Funding Evil: How Terrorism Is Financed and How To Stop It," about the Saudi billionaire, Khalid bin Mahfouz.

The letter said that Mahfouz denied the allegations in my book that he funded al Qaeda and other Muslim terrorists organizations. Mahfouz's lawyers demanded my public apology or retraction, removing my book from circulation, legal fees and a donation to a charity of Mahfouz's choice. This was followed by further messages, faxes, mail and legal papers served.

I am a scholar dedicated to exposing the enemies of freedom in Western democracies through publications, in books and articles. The psychological, emotional and financial effects of the threat of this libel suit against me in London will stay with me as long as I live.

I refused to recognize the English court's jurisdiction over me. I did not believe that I should have to defend myself in a country where my book was not published or even marketed.

Nevertheless, I was sued for libel in London, because 23 copies of "Funding Evil" found their way to Britain, mostly through the

Internet, which also carried the chapter of my book. In 2005, the British court granted Mahfouz a judgment by default, awarding him hundreds of dollars and other sanctions.

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

Mahfouz also uses a dedicated Web site to advertise my judgment with more than 40 other names of those he threatened and sued in London.

Mahfouz's suit has never been tried on the merit. Yet, the British judgment affected my ability to publish. The threat he wields over me, and over others, chilled American publishers, especially those with assets overseas, from publishing books containing information on terror financiers.

Mahfouz also chilled my ability to travel to the U.K., lest I be arrested to enforce the British judgment against me. I run the same risk in Europe and in most Commonwealth states, due to their reciprocal enforcement of judgments.

The Free Speech Protection Act includes provisions to countersue and damages. These are essential to remove the chilling effect of foreign libel suits, because they will serve as a deterrent to people contemplating to sue American writers and publishers in England or other foreign jurisdictions.

Do you think Mahfouz would have sued me had he known I could countersue him and ask for damages? And would not that be true for others who sue the Americans in London or elsewhere?

Today is a special day to have this hearing. We all know the significance of the man whose birthday we celebrate today. Lincoln was, among other things, a wonderful writer, who held this Nation together with his words that he published, and which we revere to this day.

Imagine if he was intimidated, threatened and chilled from publishing those words by threat of foreign libel lawsuits. It is therefore fitting and proper that this Committee held this hearing about freedom of expression on Lincoln's birthday.

I urge Congress to pass the Free Speech Protection Act, because it is fitting and proper that it should do so.

[The prepared statement of Ms. Ehrenfeld follows:]

#### PREPARED STATEMENT OF RACHEL EHRENFELD

Thank you, Mr. Chairman and members of the Committee, for holding this hearing, which touches me personally. My special thanks to Chairman Cohen for inviting me. In addition to my oral testimony, I submit my written statement for the record.

We are confronted by libel tourism—a pernicious and growing phenomenon, especially after the 9/11 attacks on America—whereby wealthy and corrupt terror financiers exploit plaintiff-friendly foreign libel laws and expansive Internet jurisdiction to silence American authors and publishers. Foreign libel laws have become a potent weapon used by the forces of tyranny who seek to undermine our freedom. The Free Speech Protection Act can stop this.

In *New York Times v. Sullivan*, the Supreme Court struck a critical balance between libel actions and a free press guaranteed by the First Amendment. The high court raised the bar for libel plaintiffs to insure our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and



wide-open.” Based on that principle, the court declared: “libel can claim no talismanic immunity from constitutional limitations.”

Outside the United States, there are no such “constitutional limitations.” The House of Lords explicitly rejected the Sullivan standard. So did the Canadian Supreme Court. Although all forty-one-member states of the Council of Europe submit to the European Court of Human Rights, Article 10 of its charter also rejects the Sullivan standard.

In many countries, journalists can be jailed for criminal libel; truth is often not a defense; high office holders enjoy extra protection against criticism; publications can be confiscated; newspapers and broadcast stations can be shuttered; and writers can be forced to publish adverse court orders, and repudiate as false what they know to be true.

Congress must protect American writers and publishers to guarantee the “uninhibited, robust and wide-open” debate the First Amendment was designed to protect. Scholars like me seek Congress’s help to stop libel tourism from limiting our ability to write freely about important matters of public policy vital to our national security.

I can attest that libel tourism is costly, financially and emotionally. I do not command an army—or control an industry—or have vast wealth—or hold political office. In other words, I do not possess any traditional sources of power in society. Instead, I write. I am a scholar dedicated to expose the enemies of freedom and Western democracy. I expend 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. Like most responsible scholars, I publish only material that can be verified. My credibility and livelihood depend on it.

In 1992, I published *Narcoterrorism: How Governments Around the World Have Used the Drug Trade to Finance and Further Terrorist Activities*, and first called attention to the intimate relationship between drug trafficking and terrorism.

Terrorism is not cheap. To the contrary, it is a capital-intensive activity. It requires lots of cash for training, weapons, vehicles, salaries, cell phones, airline travel, food and lodging; etc. I showed how the drug trade, not just oil profits, fuels terrorist organizations. While policy makers were romanticizing the Palestine Liberation Organization as a group of so-called “freedom fighters,” I showed how the PLO filled its coffers with billions of dollars from heroin, hashish, airplane highjacking, extortion and illegal arms sales. Until my book, neither the American government nor international agencies for drug control publicly linked narcotics and terrorism.

When asked why he robbed banks, Willy Sutton famously replied: “Because that’s where the money is.” I followed his lead and followed the money. This led to my second book, *Evil Money: The Inside Story of Money Laundering and Corruption in Government, Banks and Business*, in which I connected the dots between drug profits, money laundering, political corruption, Islamic banking and how illicit funds are used to undermine democracies.

The Committee undoubtedly remembers BCCI, the Bank of Credit and Commerce International, the cash till for Hezbollah, the PLO, HAMAS, Abu Nidal and other terrorist organizations. BCCI’s chief operating officer was Saudi billionaire, Khalid bin Mahfouz, banker to the Saudi royal family and at that time, owner of the National Commercial Bank of Saudi Arabia. In 1992, Mahfouz paid \$225 million to settle criminal charges against him in New York arising from his control of BCCI.

In 2003, I published my third book, *Funding Evil, How Terrorism is Financed and How to Stop It*. In that book, I showed the true face of terrorism. It is not the stereotype of underprivileged Islamic youth yearning to be religious martyrs, but instead, an international network of corrupt dictators, drug kingpins, and villains like Mahfouz who 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.

In response, Mahfouz sued me for libel. What happened to me did not occur in a dark backwater of totalitarian repression like Syria, Saudi Arabia, or North Korea, but in England. Mahfouz does not live there. I do not live there. My book was not published or marketed there. Nonetheless, the English court accepted jurisdiction because twenty-three copies of *Funding Evil* arrived in England via Internet purchases.

English law does not distinguish between private persons and public figures. Allegedly, offensive statements are presumed defamatory and the libel defendant bears the burden to prove they are true. Official documents from non-English sources are typically inadmissible in court, and Arab dictatorships refuse to help Western writers and publishers prove allegations about terrorism.

Protection of opinion is limited and multiple suits are allowed for a single act of publication. Libel defendants have limited pre-trial discovery and no right to depose plaintiffs under oath, as in American courts. Thus, libel plaintiffs usually win, verdicts are substantial, and defendants must pay the plaintiff's legal fees. It is no wonder then, the Times of London called London the "libel capital of the Western world."

Mahfouz's threats conveyed by E-mails, faxes, and legal papers were unsettling, and on one occasion, I was warned to do as he demanded if I "knew what was good for me" because he has friends in high places who wield great influence in the U.S.

I refused to recognize the English court's jurisdiction because I should not have to defend myself abroad. The British court granted Mahfouz a default judgment and awarded him hundreds of thousands of dollars; required me to prevent copies of *Funding Evil* from reaching Britain; and ordered me to publish retractions drafted by his solicitors.

Libel tourism by Mahfouz and others like him made me realize something more was at stake than my book and the particulars involving him. In response, I sued Mahfouz in New York to declare his English judgment violated my rights under the First Amendment. That litigation led the New York Legislature last May to enact New York's version of the Free Speech Protection Act. Illinois followed suit last August.

Until the new statute protected me—dubbed by the media as "Rachel's Law"—Mahfouz's English judgment hung over my head like a sword of Damocles and kept me up at night.

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. Mahfouz's libel tourism 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. In nearly forty cases, Mahfouz obtained settlements against his victims, all with forced apologies, by the mere threat of libel litigation. His boasts about this on his website to effectively silence and intimidate his critics in the media and academia.

Case law speaks of the "chilling effect" on free speech threatened by unrestrained libel actions. My case demonstrates the chilling effect is no mere abstraction. I cannot travel to the U.K., lest I be arrested 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.

I close with the immortal words of Justice Brandeis in *Whitney v. California*:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

A free press is vital not only to our lifestyles, but also, to our national security to protect writers like me who expose those who do us evil. New York and Illinois have enacted laws to protect their citizens from the scourge of libel tourism which threatens press freedom and scholars, writers and publishers everywhere. The federal Free Speech Protection Act insures all American citizens will enjoy such protection. Congress should pass it without delay.

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Mr. COHEN. Thank you very much for your statement.

And I want to recognize a former Member, Congressperson Pat Schroeder who is here, and always honored to be in her presence. And I appreciate your brevity. It is something uncommon in this place.

Mr. Brown?

**TESTIMONY OF BRUCE D. BROWN, ESQ.,  
BAKER AND HOSTETLER, LLP**

Mr. BROWN. Thank you.

It is a pleasure to be here today, and I thank the Subcommittee for its interest in finding a way to counter a growing and, so far unresolved, problem: the threat of libel tourism to first amendment interests in the U.S.

It is a favorite line of London libel lawyers when they travel to conferences in the U.S. to quip with a nod to the great Johnny Cash, that they have just come from a town named Sue. That I have heard that same joke in different cities, coming from different English libel lawyers, tells you something about how well entrenched libel tourism has become.

Speaking at these events with English lawyers about the historical differences in the way the two countries balance free speech with reputational interests has always been intellectually interesting, for sure. These differences, in fact, used to be solely the stuff of academic conferences and law review articles.

But today, the importance of the distinction is far from abstract or theoretical, because today there are stories such as the one you just heard from author Rachel Ehrenfeld.

Two principal things have happened. First, British judges have been exceptionally generous to libel plaintiffs from all parts of the world, who seek to use U.K. courts to hear their claims despite a tenuous connection on their part, or on the part of the defendant, to England.

Second, publication over the Internet means that online content published in the U.S. and intended primarily for an American audience can be viewed anywhere around the globe, giving the English courts the thinnest of jurisdictional hooks for libel cases, but one that they have seized.

London, therefore, has become the destination for a new class of libel litigant, who circumvents the strong free speech protections in our courts, and sues instead—or threatens to sue—in the U.K., where the standards are much weaker. Fear of substantial libel judgments in the U.K. plainly has a distorting impact on what is published here at home, stifling free speech in the U.S. on many important subjects. And so, libel tourism was born.

The problem was in many ways predictable, as the U.S. and the U.K. traditions became more entangled in the online world. But the remedy thus far has been elusive. I am thrilled to see this Subcommittee pursuing one in this Congress.

The written testimony you have from the other panelists and from me explains the incentives for a plaintiff to be in a U.K. court, highlighting the specific ways in which U.S. law is more protective than U.K. law in the libel area.

While Rachel Ehrenfeld's story is well known, there are many others that are not, such as Humayun Mirza's. I tell his full story in my written statement, but let me briefly point out a few details.

Mr. Mirza is the son of the first president of Pakistan. He retired after 30 years at the World Bank and wrote a biography of his father, from his home in Bethesda. The University Press of America based in Lanham, Maryland, published it in 1999.

Mr. Mirza received a letter from the U.K. attorneys of his father's second wife, threatening to sue him in London. Each statement Mr. Mirza had written about her was founded on first-hand observation, decades of conversations with family members and Pakistani leaders, as well as State Department files.

The book would unquestionably have been protected under U.S. law, and it was hardly distributed in the U.K. But Mr. Mirza was intimidated into withdrawing it, nonetheless.

In a U.K. court, he would have had the burden of proving the truth of the statements—a daunting task regarding incidents that in some cases had taken place a half a century earlier in Pakistan. In a U.S. court, the first amendment has shifted this burden, and it is the plaintiff who must prove falsity.

Moreover, as the wife of a former head of state, Mrs. Mirza, in a U.S. court, would have been a public figure required to prove that the allegedly defamatory statements about her were published with actual malice, or clear and convincing evidence that Mr. Mirza was aware that the statements were false or made them with reckless disregard for the truth.

English courts have no such protections. So there ultimately was no case called *Mirza v. Mirza* in the U.K., because Mr. Mirza and his publisher could not risk it.

Countering the impact of libel tourism is not about second-guessing the British people for striking a different balance between free speech and reputation than we have. It is about making sure that foreign jurisdictions do not dictate to us how we should strike this balance for ourselves.

I first met Laura Handman just over 10 years ago when she wrote a very important friend of court brief in the *Matusevitch* case, which I am sure we will hear about. I covered the case for *Legal Times*, and quoted the Wilmer Cutler lawyer who was representing Mr. Matusevitch pro bono.

What he told me then could be said today about the whole libel tourism debate. "This case is not about exporting American law. It is about importing British law."

And as the U.S. Supreme Court said, that is one of the reasons we fought a revolution.

Thank you.

[The prepared statement of Mr. Brown follows:]

PREPARED STATEMENT OF BRUCE D. BROWN

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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.

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.<sup>1</sup>) 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."<sup>2</sup> This probing standard, enunciated in Bose Corp. v. Consumers Union of U.S., 466 U.S. 485 (1984), requires judges to deviate from the typical standard of appellate review of jury verdicts by examining the entire record and substituting their own judgment for that of the jury on matters relating to the weighing of evidence and the drawing of inferences. As a result, as the Media Law Resource Center has been diligently documenting for years, more than 70 percent of libel verdicts are overturned on appeal in the U.S.<sup>3</sup> Appellate tribunals in the U.K. have no analogue to the Bose rule.

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

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

#### The Evolution of Libel Tourism

Until the mid-1990s, the difference in U.S. and U.K. libel law was a subject largely confined to academic journals and law school classrooms. Then, in 1996, controversial English historian David Irving sued Emory University Professor Deborah Lipstadt in London for defamation after she properly and accurately called him a "Holocaust denier."<sup>4</sup> 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.<sup>5</sup> It was only after five-year ordeal that culminated in a 10-day trial and cost upwards of \$3 million that she escaped liability.<sup>6</sup>

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."<sup>7</sup> 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?"<sup>8</sup> 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."<sup>9</sup> 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.<sup>10</sup> Klebnikov was murdered on a Moscow street in 2004.<sup>11</sup>

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.<sup>12</sup> The chilling effect of Mr. bin Mahfouz's litigation campaign is clear.



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

- Ekstra Bladet, a tabloid newspaper in Denmark, was sued in the U.K. by Kaupthing, an investment bank in Iceland, over articles that were critical about the bank's advice to its wealthy clients about tax shelters. The bank and the newspaper are still litigating the dispute in a system, the newspaper notes, in which it is forced to pay five times as much to litigate the case than it would in Denmark.<sup>13</sup>
- 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.<sup>14</sup>
- Rinat Akhmetov, one of the Ukraine's richest men, filed lawsuits against two Ukrainian-based news organizations. In one case, the Kyiv Post quickly settled and apologized. In the other, Mr. Akhmetov won a default judgment of \$75,000 against Obozrevatel, a Ukrainian-based internet news site that publishes articles in Ukrainian.<sup>15</sup>

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.<sup>16</sup> In Ms. Ehrenfeld's case, only 23 copies of her book found their way into the hands of British citizens.<sup>17</sup> 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.<sup>18</sup> And in the case of Al Arabiya, the program in question was available in Britain only by satellite.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup> As a result, libel plaintiffs find England a very hospitable place to sue American authors, and, the laws of supply and demand being what they are, London is home to a plaintiff's media bar with far more resources and far greater numbers than what is found in the U.S. As Ms. Ehrenfeld discovered, U.K. courts are appealing to libel tourists for the additional reason that they will grant injunctions against further publication, a remedy wholly foreign to American jurisprudence with its traditions against prior restraint. For Ms. Ehrenfeld, the injunction against "Funding Evil"

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

#### A Tale of Two Presses

In 2007, after Mr. bin Mahfouz sued two American authors who tied him to terrorism, the authors' publisher, Cambridge University Press agreed to pulp all unsold copies of the book, "Alms for Jihad," rather than defend the work.<sup>22</sup> 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."<sup>23</sup> Cambridge University Press also published an apology on its website noting that it would pay substantial damages and legal costs.<sup>24</sup>

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."<sup>25</sup> 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.<sup>26</sup>

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

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.<sup>30</sup> 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."<sup>31</sup> KinderUSA withdrew the suit before the court could even hear the motion.<sup>32</sup>

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

American-Islamic relations, an issue of utmost importance in the international political milieu.” The plaintiff never responded to the motion and the case was dismissed. A libel suit filed by the Islamic Society of Boston against the Boston Herald met a somewhat similar fate in 2007. The action was based on an article that linked the Islamic Society to Abdurahman Alamoudi, a public supporter of terrorist organizations including Hamas and Hezbollah.<sup>33</sup> 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.<sup>34</sup>

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

#### The Chilling Effect of Libel Tourism

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

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

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

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

My colleagues Bruce Sanford, Lee Ellis, Henry Hoberman, and Bob Lystad represented journalist Craig Unger more than a decade ago in a libel suit filed by Robert McFarlane against Esquire magazine over an article on the alleged “October Surprise” at the end of the Carter presidency regarding efforts to negotiate the release of the American hostages in Iran.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

#### 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.”<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup> 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.<sup>44</sup> See also Tim Luckhurst, “For freedom’s sake, we must stop libel tourism,” *THE GUARDIAN*, Aug. 15, 2008; Nick Cohen, “A free speech crusade we should all be proud to join,” *THE EVENING STANDARD*, Dec. 11, 2008.

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

#### Solving the Libel Tourism Problem

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

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

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

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.

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<sup>1</sup> *Reynolds v. Times Newspapers*, [1999] 4 All ER 609, [2001] 2 AC 127, [1999] 3 WLR 1010, [1999] U.K.H.L. 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).

<sup>2</sup> *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 499 (1984).

<sup>3</sup> Media Law Res. Ctr. Bulletin, Issuc 1, 2007 Report on Trials and Damages (Feb. 2007).

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

<sup>5</sup> Samah 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.

<sup>6</sup> Luall, *supra* note 5.

<sup>7</sup> Brown, *supra* note 4.

<sup>8</sup> Paul Klebnikov, "Godfather of the Kremlin?" *FORBES*, Dec. 30, 1996.

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

<sup>10</sup> Editor's Note, "Berezovsky versus Forbes," *Forbes.com*, March 6, 2003, available at [http://www.forbes.com/forbes/1996/1230/5815090a\\_print.html](http://www.forbes.com/forbes/1996/1230/5815090a_print.html).

<sup>11</sup> Valeria Korchagina, "Forbes Editor Klebnikov Shot Dead," *MOSCOW TIMES*, July 12, 2004.

<sup>12</sup> See [www.binnmahfouz.info](http://www.binnmahfouz.info).

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

<sup>14</sup> Carvajal, *supra* note 13.

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

<sup>16</sup> *Berezovsky*, *supra* note 9.

<sup>17</sup> *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830, 832 (N.Y. 2007).

<sup>18</sup> Carvajal, *supra* note 13.

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<sup>19</sup> Carvajal, *supra* note 13.

<sup>20</sup> Carvajal, *supra* note 13.

<sup>21</sup> 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”).

<sup>22</sup> Gary Shapiro, “Libel Suit Leads to Destruction of Books,” N.Y. SUN, Aug. 2, 2007.

<sup>23</sup> Shapiro, *supra* note 22.

<sup>24</sup> Shapiro, *supra* note 22.

<sup>25</sup> Scott Jaschik, “A University Press Stands Up – And Wins,” INSIDE HIGHER ED, Aug. 16, 2007.

<sup>26</sup> Jaschik, *supra* note 25.

<sup>27</sup> Jaschik, *supra* note 25.

<sup>28</sup> Jaschik, *supra* note 25.

<sup>29</sup> Jaschik, *supra* note 25.

<sup>30</sup> 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.

<sup>31</sup> Jaschik, *supra* note 25.

<sup>32</sup> Jaschik, *supra* note 25.

<sup>33</sup> Floyd Abrams, “Be Careful What You Sue For,” WALL ST. J., June 6, 2007, at A19 (attached as Exhibit D).

<sup>34</sup> Abrams, *supra* note 33.

<sup>35</sup> 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).

<sup>36</sup> *McFarlane v. Esquire Magazine*, 74 F.3d 1296 (D.C. Cir. 1996).

<sup>37</sup> *McFarlane*, *supra* note 36.

<sup>38</sup> Adam Cohen, “‘Libel Tourism’: When Freedom of Speech Takes a Holiday,” N.Y. TIMES, Sept. 14, 2008.

<sup>39</sup> The Pearl Project, <http://scs.georgetown.edu/pearlproject/>.

<sup>40</sup> Specter and Lieberman, *supra* note 35.

<sup>41</sup> David Pallister, “MPs demand reform of libel laws,” THE GUARDIAN, Dec. 18, 2008.

<sup>42</sup> Pallister, *supra* note 41.

<sup>43</sup> *Reynolds*, *supra* note 1.

<sup>44</sup> Pallister, *supra* note 41.

<sup>45</sup> David B. Rivkin, Jr. and Bruce D. Brown, “‘Libel Tourism’ Threatens Free Speech,” WALL ST. J., Jan. 10, 2009 (attached as Exhibit F).

**Exhibit A**

	<b>Public official or public figure</b>	<b>Private figure on a matter of public concern</b>	<b>Private figure on a matter of private concern</b>
<b>Falsity</b>	Plaintiff bears burden of proving that statement was substantially false as a matter of federal constitutional law. <sup>1</sup>	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. <sup>2</sup>	Burden of proof not yet decided.
<b>Fault</b>	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. <sup>3</sup>	Plaintiff bears burden of proving only negligence as a matter of federal constitutional law; <sup>4</sup> some states require proof of “actual malice” under state law.	Plaintiff bears burden of proving only negligence as a matter of federal constitutional law. <sup>5</sup>
<b>Compensatory Damages</b>	If plaintiff proves “actual malice,” compensatory damages available. <sup>6</sup>	If plaintiff proves negligence and actual injury, compensatory damages available; <sup>7</sup> if plaintiff proves “actual malice,” compensatory damages available. <sup>8</sup>	If plaintiff proves negligence, compensatory damages available. <sup>9</sup>
<b>Punitive Damages</b>	If plaintiff proves “actual malice,” punitive damages available. <sup>10</sup>	Only if plaintiff proves “actual malice” are punitive damages available. <sup>11</sup>	If plaintiff proves negligence, punitive damages available. <sup>12</sup>

<sup>1</sup> 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.

<sup>2</sup> Hepps, *supra* note 1.

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

<sup>4</sup> Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

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

<sup>6</sup> Gertz, *supra* note 4.

<sup>7</sup> Gertz, *supra* note 4.

<sup>8</sup> Gertz, *supra* note 4.

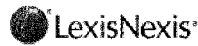
<sup>9</sup> Dun & Bradstreet, *supra* note 5.

<sup>10</sup> Gertz, *supra* note 4.

<sup>11</sup> Gertz, *supra* note 4.

<sup>12</sup> Dun & Bradstreet, *supra* note 5.



**Exhibit B**

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April 23, 2000, Sunday, Final Edition

**SECTION:** OUTLOOK; Pg. B01**LENGTH:** 1750 words**HEADLINE:** Write Here. Libel There. So Beware**BYLINE:** Bruce D. Brown**BODY:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**GRAPHIC:** Illustration, jamusz kapusta for The Washington Post

**LOAD-DATE:** April 23, 2000

## Exhibit C



WORLD  
**INTERNATIONAL**

## Libel tourism

**Writ large**

Jan 31st 2009  
From The Economist print edition

**Are English courts stifling free speech around the world?**

Illustration by Dave Givens



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

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

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

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

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

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

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

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

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

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

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

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

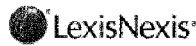
confidential informants—usually a necessity when dealing with violent and repressive regimes. People involved in this kind of litigation in Britain say that they have evidence of instances where witnesses have been intimidated by sleuthing and snooping on behalf of the plaintiffs, who may have powerful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

### **Private matters**

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

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

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

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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 Sodomite" and wound up not only dropping his case but being tried, convicted and jailed for violating England's repressive laws banning homosexual conduct. Alger Hiss sued Wiltaker Chambers for slander for accusing Hiss of being a member of the Communist Party with Chambers, and of illegally passing secret government documents to him for transmission to the Soviet Union. In the end, Hiss was jailed for perjury for having denied Chambers' claims before a grand jury.

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

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

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

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

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

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

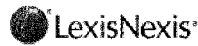
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**THE WALL STREET JOURNAL**  
The Wall Street Journal

July 14, 2008 Monday

**SECTION:** Pg. A15

**LENGTH:** 664 words

**HEADLINE:** Foreign Courts Take Aim at Our Free Speech

**BYLINE:** By Arlen Specter and Joe Lieberman

**BODY:**

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

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

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

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

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

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

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

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

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

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

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

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

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**THE WALL STREET JOURNAL**  
The Wall Street Journal

January 10, 2009 Saturday

**SECTION:** Pg. A11

**LENGTH:** 968 words

**HEADLINE:** 'Libel Tourism' Threatens Free Speech

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

**BODY:**

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

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

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

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

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

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

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

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

**Exhibit E**

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 un-constitutional 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.

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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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Mr. COHEN. Thank you, Mr. Brown.

Ms. Handman?

And we are going to do what we probably should do, which is to respect your time and our Committee schedule, and pass on recessing for the Lincoln event. I think he will understand.

Ms. Handman?

**TESTIMONY OF LAURA R. HANDMAN, ESQ.,  
DAVIS WRIGHT TREMAINE, LLP**

Ms. HANDMAN. Thank you. And I hope I do him justice.

Thank you so much, Chairman Cohen and Ranking Member Franks and the other Members of the Committee, for inviting me to speak about an issue that has been a passion of mine for nearly 20 years.

I applaud the heroic determination of Rachel Ehrenfeld and the efforts of this Committee to address the growing problem of libel tourism. My support is coupled with the greatest respect for the international comity concerns that Professor Silberman will undoubtedly raise. And I have the greatest respect for the British common law, which is the very foundation and genius of our legal system.

But I have had the dubious honor of being introduced by my British counterparts to English judges as the American lawyer who got, quote, our law, British libel law, declared repugnant. I garnered that reputation, because I was counsel in the only two decisions so far where American courts have refused to enforce British libel judgments.

And I would like to take a moment to explain the Bachchan case, because its facts really highlight the differences.

In 1991, I was asked by the late Gopal Raju whether I would represent India Abroad, a newspaper and wire service based in Manhattan, which served an audience of Indians living primarily in the U.S. He had just been hit with a judgment from a London court in a libel action brought by Ajitabh Bachchan, a member of one of India's most prominent families.

To give you a sense of just how big a deal this family was, if you have seen the film "Slumdog Millionaire," you will remember when the Bollywood star comes via helicopter to the slums and Jamal, locked in the latrine by his brother, dives into the hole in the floor so he can escape and get the star's autograph.

That star, Amitabh Bachchan, was the brother of the plaintiff in this case. Both Bachchan brothers were intimates of Rajiv Gandhi, then India's prime minister.

The story in India Abroad reported that the leading Swedish daily newspaper, Dagens Nyheter, had reported a new development in the widely publicized scandal involving alleged kickbacks by a Swedish munitions company to obtain Indian government contracts.

India Abroad—should I wait for the—

Mr. COHEN. Do not worry about that. That is something that you learn about in your fifth term. So, you can go ahead. [Laughter.]

Ms. HANDMAN. India Abroad reported that Dagens Nyheter had reported that a Swiss bank account belonging to the plaintiff had been frozen by Swiss authorities. Bachchan sued Dagens Nyheter

and India Abroad in London. And the Swedish paper immediately issued a retraction and settled.

India Abroad reported the retraction, but did not settle. That left India Abroad with no defense, because its sole source had said it had made a mistake.

In the U.K., India Abroad had the burden of proving that the claims were true. With Dagens Nyheter having claimed—admitted it was false, that was not possible.

It did not matter that the plaintiff was a quintessential public figure, or the subject matter was quintessentially of public concern, involving a political scandal reaching up all the way to the prime minister facing re-election. It did not matter that all that India Abroad did was publish an accurate story about what a highly respected newspaper had reported.

In the U.S., plaintiffs could not possibly establish that India Abroad published with fault—any kind of fault, negligence or actual malice—since reliance on a reporting of a reputable news organization is what all news organizations do, should do, and what small newspapers like India Abroad must do.

In England, particularly under the laws at the time, a mistake is a mistake. News organizations are essentially guarantors of accuracy, and India Abroad had to pay.

These are not minor differences between our two bodies of law. These go to the core protections, the breathing space ensured by *New York Times v. Sullivan* for political speech.

So, when Bachchan came to New York, no U.S. court had refused to enforce a foreign libel judgment. But Justice Shirley Fingerhood refused to do so, because, she said, “England and the United States share many common law principles of law. Nevertheless, a significant difference between the jurisdictions lies in England’s lack of an equivalent to the first amendment of the United States Constitution.”

We did win six-to-one in Maryland in the *Matusevitch* case that Bruce Brown mentioned. But since these cases, the pilgrimage of libel plaintiffs—be it Britney Spears, Russian oligarch Boris Berezovsky, or Sheikh Khalid bin Mahfouz—they have all flocked to London.

Virtually every demand letter we receive these days from a U.S. lawyer is now accompanied by one from a British solicitor. Libel tourism has only grown, as the Internet permits even a newspaper like the Washington Times, which sold zero hard copies in the U.K., to be sued in London by an international businessman based on several dozen hits in the U.K. on an Internet Web site about a story about a Pentagon report.

In part because of Bachchan and *Matusevitch*, the British courts have moved a step away from strict liability and a step closer to fault. But with increasing economic pressures, fewer and fewer media companies—much less individual authors like Ms. Ehrenfeld—can afford the risk of a more than likely judgment against them in a British courtroom.

In the case of Forbes, that could be three judgments, since they are currently being sued simultaneously in Ireland, Northern Ireland and England for the same story, by the same lawyer.

That risk is further compounded by the English rule that makes the loser pay the winner's legal fees, as well as their own. With British solicitors charging rates as high as 1,300 pounds per hour per lawyer, the result is predictable: U.S. media agreeing to outside settlements for cases that would have had no chance of success in the U.S.; and self-censoring, by either not writing about public figures known to be litigious, not engaging in investigative reporting; or not publishing in the U.K. at all.

No one, not the audience in the U.S. or overseas, is well served by such a regime.

I think that H.R. 6146 is an important step, making mandatory on the Federal level the Bachchan decision. I have suggested in my written testimony ways to enhance its remedial impact.

Thank you very much. I look forward to your questions.

[The prepared statement of Ms. Handman follows:]

PREPARED STATEMENT OF LAURA R. HANDMAN

Testimony of Laura R. Handman  
Davis Wright Tremaine LLP

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

On Libel Tourism

February 12, 2009

Mr. Chairman, Ranking Member Franks and Members of the Subcommittee:

**QUALIFICATIONS**

I am Laura R. Handman, a partner in the law firm of Davis Wright Tremaine LLP, working out of the firm's offices in New York and the District of Columbia. I am truly honored to appear before you today about an issue on which I have been on the front lines for nearly 20 years.

Following a federal district court clerkship and four years as an Assistant United States Attorney, I have devoted 25 of my 31 years of practice to representing both U.S. and British-based newspapers, magazines, broadcasters, book publishers, book sellers and online publishers. For my clients, I provide counseling prior to publication or broadcast, advising them about the legal risks arising out of the content they propose to publish or broadcast. I also represent media organizations in litigation, from complaint through trial and appeal. My representation generally involves issues of libel, privacy, copyright, trademark, reporter's privilege, newsgathering, access to information and other First Amendment content-related matters. I have been named by the British-based Chambers, the leading lawyer directory, as one of "America's Leading Business Lawyers" in National First Amendment Litigation, and was awarded the 2007 International PEN First Amendment Award from the international writers' organization. I have chaired the Communications and Media Law Committee of the Association of the Bar of the City of New York and the Media Law Committee of the Arts, Entertainment and Sports Law Section of the D.C. Bar and have served on the Governing Board of the Forum on Communications Law of the American Bar Association. I am the past President of the Defense Counsel Section of the Media Law Resource Center, the leading national organization of media defense lawyers. I am currently Co-Chair of the committee of the Council for Court Excellence drafting a Journalist's Guide to the D.C. Courts.

I have been introduced by my British counterparts to English judges as the "American lawyer who got our libel law declared repugnant." I obtained the first – and last – decisions from U.S. courts refusing to enforce British libel judgments as contrary to public policy. In *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992), an English court had imposed liability on a New York-based newspaper



for a story about alleged corruption involving one of India's most prominent families. If England had had the equivalent of the actual malice standard, there would not been a judgment against the newspaper. Accordingly, the New York State court refused to enforce the British libel judgment. In *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997), I argued on behalf of many leading media organizations as *amici* in Maryland's highest court in support of an American citizen who wrote a letter to the editor in response to an op-ed column in a British newspaper, suggesting the op-ed author was a "racialist" espousing a "blood test" for employment in a foreign radio service. Such a clear expression of opinion could not have been the subject of a judgment in a U.S. court. In view of these starkly outcome-determinative differences about matters of clear public concern, the New York court in 1992 and Maryland Court in 1997 refused to enforce the British libel judgments.

Because of these precedent-setting victories, I have been asked to serve as an expert on U.S. libel law in foreign libel cases in Belfast, London and Melbourne, to speak on numerous panels comparing foreign and U.S. libel law, and to write on the problem of libel tourism.<sup>1</sup> I have served as an expert on U.S. libel law in support of the magazine *Barron's*, published by Dow Jones & Company in two cases, *Gutnick v. Dow Jones & Co.*<sup>2</sup> and *Chadha & Osicom Technologies, Inc. v. Dow Jones & Co.*<sup>3</sup> In the former, because the plaintiff was a resident of Australia, even though only five copies of the publication were sold in Victoria and just 1700 of the 550,000 international subscribers had Australia-based credit cards, jurisdiction was available in Australia. In *Chadha*, even though the London court initially found jurisdiction, because the plaintiffs were based in California with few ties to the U.K., it ultimately dismissed the case for *forum non conveniens*. Unfortunately, such dismissals have been more the exception than the rule where minimal contacts and minimal publication have sufficed to keep U.S. publishers defending libel cases in British courts. I also served as an expert on behalf of Amazon.com in *Vassiliev v. Amazon.com* which involved, among other things, a review by a reader of a book sold by Amazon about the controversy over Alger Hiss. In the U.S., the website publication of a reader's comment would clearly have been protected by Section 230 of the Communications Decency Act,<sup>4</sup> but the U.K. has no equivalent for protection of websites for third-party comments.

## **BACKGROUND**

Global electronic and satellite communications have erased the traditional jurisdictional boundaries that previously applied to libel law. Today, any book, article, or broadcast found online, even those published exclusively in the United States, can be subject to the libel laws of another country. As a result, publishers, journalists, authors, booksellers and other members of the American media are increasingly concerned about the practice of

<sup>1</sup> "Bachchan v. India Abroad: Non Recognition of British Libel Judgments: The American Revolution Revisited," *Communications Lawyer*, a publication of the ABA, Fall 1992 (with Robert D. Balin).

<sup>2</sup> [2002] HCA 56, 210 C.L.R. 575 (Austl.).

<sup>3</sup> [1999] E.M.L.R. 724, [1999] I.L.Pr. 829, [1999] EWCA Civ 1415.

<sup>4</sup> 47 U.S.C. § 230; *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. Ct. App. 2001) (Amazon.com not liable for reader's comment).

“libel tourism:” foreigners suing other foreigners in England or elsewhere, and using those judgments to deter authors, publishers and broadcasters from reporting on matters of public concern.<sup>5</sup> Libel tourism, long a tactic used by celebrities and political figures seeking to take advantage of claimant friendly libel laws, has increasingly become used to suppress legitimate reporting on public figures ranging from international financiers to business tycoons whose activities are under scrutiny.<sup>6</sup>

H.R. 6146 is a necessary step in the efforts to combat the effects of libel tourism. Passage of this legislation would provide protection for American authors, publishers and broadcasters from enforcement of foreign judgments that are inconsistent with the First Amendment. I have included some suggested amendments to address problems for which the current legislation may not offer sufficient redress.

### Differences between U.S. and English Libel Law

Stark differences exist between U.S. and English libel law. In many ways, libel laws in the U.S. and England constitute mirror images of each other, with the burden of proof shifted to defendant in the U.K. and the plaintiff in the U.S. English libel law is essentially based on a system of strict liability – you make a mistake, you pay. As a result, many identical cases would be decided differently in the two countries. Under English law, any published statement that adversely affects an individual’s reputation or the respect in which a person is held is *prima facie* defamatory.<sup>7</sup> The plaintiff’s only burden is to establish that the allegedly defamatory statements apply to them, were published by the defendant and have a defamatory meaning.

Since allegedly defamatory statements are presumed false under British law, it is the defendant who must prove the truth or “justification” of the statements or establish another privilege to defeat the charges. If the defendant attempts to prove truth and fails, he can face an aggravated damages award. In the U.S., if the plaintiff is a public figure or public official or the statement at issue involves a matter of public concern, defendant does not have the burden of proving truth; the plaintiff has the burden of proving substantial falsity.<sup>8</sup>

While the “fair comment” exceptions under British law can save defendants from the burden of proving the truth of the underlying statement at issue, the exception provides far less protection than can be found under the comparable American law. The “fair comment” exception may apply to opinions made by the author on a matter of public interest, it must be an opinion that the author could reasonably express based on facts,

<sup>5</sup> Rachel Donadio, *Libel Without Borders*, N.Y. Times, Oct. 7, 2007, [http://www.nytimes.com/2007/10/07/books/review/Donadio-t.html?pagewanted=1&\\_r=2](http://www.nytimes.com/2007/10/07/books/review/Donadio-t.html?pagewanted=1&_r=2).

<sup>6</sup> Michael Peel & Megan Murphy, *English Courts In The Dock On “Libel Tourism,”* Financial Times, Apr. 2, 2008, [http://us.ft.com/ftgateway/superpage.ft?news\\_id=fto040120082148266717](http://us.ft.com/ftgateway/superpage.ft?news_id=fto040120082148266717).

<sup>7</sup> Rodney A. Smolla, *Law of Defamation* § 1.9 (2d ed. 1999).

<sup>8</sup> In *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 768-69 (1986), the Supreme Court held that “where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages [in a defamation action] without also showing that the statements at issue are false.”

and made without malice.<sup>9</sup> In the U.S., only statements of facts are actionable; statements that are not provable as true or false, *i.e.*, opinions, are not actionable regardless of whether a court or jury thinks they are reasonable, outlandish or harsh.<sup>10</sup> Statements of opinion, if the facts on which they are based are set forth fully and accurately, are not actionable, even if the speaker harbors ill will or malice.<sup>11</sup>

In the United States, the First Amendment provides a most important and distinct departure from England's strict liability, no fault standard. In *New York Times Co. v. Sullivan*, the U.S. Supreme Court noted that the press protections established by the American Constitution were a deliberate departure from the British form of government.<sup>12</sup> At the center is our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."<sup>13</sup> Accordingly, the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>14</sup> The *Sullivan* court then went on to hold that such malice could not be presumed (376 U.S. at 283-84), that the constitutional standard requires proof having "convincing clarity" (*id.* at 285-86) and that evidence simply supporting a finding of negligence is insufficient (*id.* at 287-88). In order to succeed on a defamation claim, public figures or public officials bringing defamation actions must show that the alleged defamatory statement was made with actual malice – with the knowledge that it was false or with reckless disregard for whether or not it was false.<sup>15</sup>

In *Curtis Publishing Co. v. Butts*, the Supreme Court held that the principles set forth in *New York Times Co. v. Sullivan* were also applicable to the defamatory criticism of "public figures."<sup>16</sup> In *Gertz v. Robert Welch*, the Supreme Court held that, although the "actual malice" standard of *New York Times Co. v. Sullivan* did not extend to defamation of individual persons who were neither public officials nor public figures, the Court rejected English law of strict liability; even a private plaintiff would still be required to show some level of fault to recover damages, negligence being the bare minimum.<sup>17</sup>

Recent pressure by the international community against England's plaintiff- friendly libel laws have led to incremental changes in English libel law. In *Reynolds v. Times Newspapers Ltd.*, the House of Lords ruled that when the media has a legitimate duty in reporting matters of public interest, a news organization may be able to successfully defend itself against libel charges. Under the standard set forth in *Reynolds*, the criteria

<sup>9</sup> Heather Maly, *Publish At Your Own Risk Or Don't Publish At All: Forum Shopping Trends In Libel Litigation Leave The First Amendment Un-Guaranteed*, 14 J.L. & Pol'y 883, 901 (2006).

<sup>10</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990).

<sup>11</sup> *Id.* at 20 ("a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection").

<sup>12</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964).

<sup>13</sup> *Id.* at 270.

<sup>14</sup> *Id.* at 279-80.

<sup>15</sup> *Sullivan*, 376 U.S. at 279-80.

<sup>16</sup> 388 U.S. 130 (1967).

<sup>17</sup> 418 U.S. 323, 347 (1974).

include the seriousness of the allegation, the steps taken to verify the information, the urgency of the matter, whether the article contained the gist of the plaintiff's side of the story, whether the comment was sought from the plaintiff, and the circumstances of the publication, including the timing.<sup>18</sup>

In the recent case *Jameel v. Wall Street Journal Europe Sprl*,<sup>19</sup> a wealthy Saudi financier sued the *Wall Street Journal Europe* in London for reporting on Saudi oversight, at the request of U.S. law enforcement agencies, of certain bank accounts. Britain's House of Lords made clear that if a media defendant can show that an article or broadcast is a matter of public interest and a product of "responsible journalism," a plaintiff cannot recover libel damages. Although *Jameel* set forth a new standard for British courts to apply to the activities of American journalists or publishers who might be sued in the U.K., the protections afforded under *Jameel* are still less than those provided to publishers and authors in the U.S. The British standard of "responsible journalism" would seem to allow the judge to evaluate, with 20/20 hindsight, the fairness of the journalism; the actual malice standard sets a much higher bar, reaching only what is tantamount to deliberate falsehoods – a subjective bad faith test. Failure to adequately investigate is not the test for actual malice.<sup>20</sup>

The English system differs from the American system in other important ways. In England, the statute of limitations runs from whenever a magazine, book, newspaper, or Internet posting is available. In the United States, the statute of limitations generally begins to run from the first publication of the statement, even if the publication stays on sale or the posting stays up on the Internet.<sup>21</sup> With regard to jurisdiction, a few hits on a website on the Internet in Great Britain may be enough to give Commonwealth courts jurisdiction to hear the plaintiff's libel case, even if the content or the web server is physically located in another country.<sup>22</sup> Contrast this to the United States, where in *Young v. New Haven Advocate*, the Fourth Circuit held that an out of state defendant's Internet activity must be expressly targeted at or directed to the forum state to establish the minimum contacts necessary to support the exercise of personal jurisdiction over defendant by district court in the forum state.<sup>23</sup> In the U.S., Internet service providers are immune from liability for speech by third parties posted on their websites.<sup>24</sup> In Britain, no such immunity exists. Under British law, a libel plaintiff can obtain an injunction against publication of the defamatory material.<sup>25</sup> In the U.S., such an injunction would be deemed an illegal prior restraint.<sup>26</sup>

<sup>18</sup> *Reynolds v. Times Newspapers Ltd*, [1999] 4 All E.R. 609, [2001] 2 A.C. 127, [1999] UKHL 45.

<sup>19</sup> *Jameel v. Wall Street Journal Europe Sprl*, [2007] 1 A.C. 359, [2006] 4 All E.R. 1279, [2006] UKHL 44.

<sup>20</sup> *St. Amant v. Thompson*, 390 U.S. 727 (1968).

<sup>21</sup> Judge Robert Sack, *Sack on Defamation*, § 7.2 (3d ed. 2007).

<sup>22</sup> *Celebrity Settles U.K. Libel Suit with National Enquirer*, News Media Update, Reporters Committee for a Free Press, Mar. 5, 2007, <http://www.rcfp/news/200710305-lib.celebr.html>.

<sup>23</sup> *Young v. New Haven Advocate*, 315 F.3d 256, 262 (4th Cir. 2002) (reversing and dismissing for lack of jurisdiction libel claims brought in Virginia against *The Hartford Courant* and *The New Haven Advocate*).

<sup>24</sup> Under the Communications Decency Act, 47 U.S.C. § 230, Internet service providers are immune from liability based on content created by a third party.

<sup>25</sup> See [http://www.binmahfouz.info/news\\_2005053.html](http://www.binmahfouz.info/news_2005053.html).

<sup>26</sup> Sack, *Sack on Defamation*, § 10.6.1.

Another stark difference between the English and American systems emerges around the issue of attorneys fees. In England, the courts allow fee shifting. Under fee shifting, the losing party must bear all of the costs associated with the litigation, including their own. This substantially increases the cost of litigation as most libel cases in the Great Britain require multiple attorneys. Under the “American rule,” attorneys’ fees are not awarded to the prevailing party unless authorized by law. State anti-SLAPP statutes are one such provision for fees to a prevailing libel defendant.<sup>27</sup>

### The Dangers of Libel Tourism

The term “libel tourism” refers to what essentially amounts to international forum shopping. Often, the claimant will seek out friendly libel laws of foreign jurisdictions to bring claims against members of the American media that would be barred (or far more difficult to bring) under American law.<sup>28</sup> This practice permits the “libel tourist” to avoid the rigorous protections afforded to speech and press under American law by filing a claim against a publisher or an author in a country with far fewer protections for such defendants.

Libel tourism is a growing trend. Increasingly, individuals who claim to be maligned by American publications or authors are turning to courts overseas to try their claims. With laws that favor plaintiffs, countries like Great Britain are becoming tourist destinations for defamation claims.<sup>29</sup> Often, this occurs even when the foreign jurisdiction has virtually no legitimate connection to the challenged publication or to the claimant. *Forbes* is currently facing lawsuits in Ireland, Northern Ireland and England for a story published in its domestic edition about the North Pole. *The Washington Times* is currently facing a claim by an international businessman, a resident of London, for an article about an unpublished Pentagon report into the award of cell phone contracts in Iraq. No hard copies of *The Washington Times* were sold in the U.K. and there were only forty or so hits on the newspaper’s website. The following are just a few recent examples highlighting the threats posed by libel tourism actions:

*Celebrities:* Celebrities, particularly Americans, are some of the most frequent libel tourists. In 2007, celebrities accounted for a third of all libel actions brought in England and Wales based on figures released by British legal publishers Sweet and Maxwell.<sup>30</sup> Advised that it is easier to win defamation and privacy claims in the United Kingdom

<sup>27</sup> Cal. Civ. Proc. Code § 425.16.

<sup>28</sup> Michael Isikoff & Mark Hosenball, *Terror Watch: Libel Tourism*, Newsweek, Oct. 22, 2003, <http://www.newsweek.com/id/61629>.

<sup>29</sup> See Jack Schafer, *Richard Perle Libel Watch Week 2*, Slate, Mar. 19, 2003, <http://www.slate.com/id/2080384>. England is not the only jurisdiction with laws that favor the plaintiff in defamation actions. Singapore has been called a “libel paradise” and New Zealand and Kyrgyzstan are also noted for being friendly to plaintiffs. However, given the plaintiff friendly legal environment in London, its proximity to the United States and the exposure of many media companies to the English market, England remains a favored destination for plaintiffs looking to engage in libel tourism.

<sup>30</sup> Robert Verkaik, *London Becomes Defamation Capital for World’s Celebrities*, The Independent, Oct. 13, 2008, <http://www.independent.co.uk/news/uk/home-news/london-becomes-defamation-capital-for-worlds-celebrities-959288.html>.

than it is in the United States, the numbers of American celebrities who are bringing such actions in the United Kingdom is increasing.<sup>31</sup> Actor Harrison Ford has consulted a solicitor in Belfast over claims in United States newspapers relating to the reprisal of his role in the most recent Indiana Jones movie, *The Kingdom of the Crystal Skull*.<sup>32</sup> *The National Enquirer* is frequently visited by libel tourists – including Britney Spears, U.S. film producer Steve Bing, Jennifer Lopez and Marc Anthony.<sup>33</sup> In 2005, *The National Enquirer* cut off access to British viewers of its website based on a settlement with American actress Cameron Diaz over a story that Diaz cheated on Justin Timberlake.<sup>34</sup> Although the story did not appear in the U.K. version of the *Enquirer*, Diaz was able to sue because the story was viewed 279 times from U.K. Internet addresses.<sup>35</sup>

French citizen and Oscar-winning director Roman Polanski won £50,000 in damages against U.S.-based Condé Nast after it was published in the 2002 July edition of *Vanity Fair* that he tried to seduce a Swedish model on his way to California for Sharon Tate's funeral, claiming that he told the model he could make her "another Sharon Tate."<sup>36</sup> In granting Polanski, a native of France and a fugitive from the American justice system, permission to sue *in absentia* in a London court and appear in the civil proceedings via video link from Paris, the House of Lords held that the English judicial system did not preclude a fugitive from U.S. justice from bringing defamation proceedings in England.<sup>37</sup>

*International businessmen:* In 1989, American oil magnate Armand Hammer instituted a libel suit in London in connection with an unauthorized biography that was distributed primarily in the United States.<sup>38</sup> The late publisher Robert Maxwell sued *The New Republic* in Britain where less than 35 copies of the publication circulated. In 1997, Texas oil magnate Oscar Wyatt sued *Forbes* in London for libel based on an article titled: "Saddam's Pal Oscar." Even though the article in question made no mention of London, Wyatt chose London as a forum based on the frequency of his trips to London and the fact that his son was the Duchess of York's infamous toe-sucking paramour.<sup>39</sup> In 1997, California businessman Parvinder Chadha sued Dow Jones in London based on an article published in *Barrons* on his company (located in California) despite the fact that less than .4% of *Barron's* circulation is in the U.K.<sup>40</sup> In 2002, *New Yorker* investigative reporter Seymour Hersh wrote a series of articles highly critical of Richard Perle, one of President George Bush's most influential advisors. Perle vowed to sue Hersh in London but

<sup>31</sup> *Id.*

<sup>32</sup> Robert Verkaik, *Invasion of the Libel Tourists*, *The Independent*, Aug. 21, 2008, <http://www.independent.co.uk/news/uk/home-news/invasion-of-the-libel-tourists-904111.html>.

<sup>33</sup> *Id.*

<sup>34</sup> Aline van Duyn, *Plug Pulled in UK over Libel Stance*, *Financial Times*, Mar. 17, 2007.

<sup>35</sup> *Id.*

<sup>36</sup> Claire Cozens, *Polanski Wins Libel Case Against Vanity Fair*, *The Guardian*, July 22, 2005, <http://www.guardian.co.uk/media/2005/jul/22/pressandpublishing.generalelection2005>.

<sup>37</sup> See *Polanski v. Condé Nast Publ'ns Ltd.*, [2005] 1 All E.R. 945, [2005] UKHL 10.

<sup>38</sup> Handman & Balin, *supra* note 1.

<sup>39</sup> Laura R. Handman & Robert Balin, "It's a Small World After All: Emerging Protections for the U.S. Media Sued in England," [http://www.dwt.com/related\\_links/adv\\_bulletins/CMITFALL1998USMedia.htm](http://www.dwt.com/related_links/adv_bulletins/CMITFALL1998USMedia.htm).

<sup>40</sup> *Chadha v. Dow Jones & Co.*, slip op. (High Ct. of Justice, Queen's Bench Division, 1997).

ultimately failed to follow through.<sup>41</sup> Sheik Khalid bin Mahfouz has been a frequent user of England's libel laws. In addition to the lawsuit filed against author Rachel Ehrenfeld, bin Mahfouz has filed multiple libel lawsuits in England, targeting any media organization that has ever printed any allegations that the bin Mahfouz family has connections to terrorism.<sup>42</sup>

In 1997, Russian oligarch Boris Berezovsky sued *Forbes* for libel in the London High Court over an article that appeared in the domestic version of *Forbes*' publication. Of the more than 780,000 copies of the magazine distributed, fewer than 6,000 readers likely saw the magazine in England and Wales (1,915 copies were circulated through newsstands and subscriptions, the remainder through viewing on the Internet).<sup>43</sup> Lord Hoffman upheld Berezovsky's right to sue *Forbes* in London in the House of Lords, holding that London should provide a forum for libel litigants from around the world, "I do not have to decide whether Russia or America is more appropriate *inter se*. I merely have to decide whether there is some other forum where substantial justice can be done [...]. If a plaintiff is libeled in this country, *prima facie*, he should be allowed to bring his claim here where the publication is."<sup>44</sup>

Although British courts are beginning to recognize important protections for libel defendants, even Members of Parliament acknowledge international furor over the practice of libel tourism. In remarks given before the House of Commons on December 17, 2008 by The Rt Hon. Dennis MacShane MP, MacShane acknowledged the problem of libel tourism and the role that it is playing in the assault on freedom of information and called for Parliament to take action on the issue, noting that it was "unbelievable that the state legislators of New York and Illinois, and Congress itself, are having to pass Bills to stop British courts seeking to fine and punish American journalist and writers for publishing books and articles that may be freely read in the United States but which a British judge has decided are offensive to wealthy foreigners who can hire lawyers in Britain to persuade a British court to become a new Soviet-style organ of censorship against freedom of expression."<sup>45</sup>

<sup>41</sup> Jack Schafer, *Richard Perle Libel Watch—the Finale*, Slate, Mar. 15, 2004, <http://www.slate.com/2097180>.

<sup>42</sup> See <http://www.binmahfouz.info>.

<sup>43</sup> Avi Bell, *Libel Tourism: International Forum Shopping For Defamation Claims*, Global Law Forum at 17 (2008), [http://www.globallawforum.org/UserFiles/puzzle22New\(1\).pdf](http://www.globallawforum.org/UserFiles/puzzle22New(1).pdf).

<sup>44</sup> *Id.* at 18.

<sup>45</sup> Remarks of the Rt. Hon. Dennis MacShane (Statement of MacShane before Parliament on Libel Tourism), Dec. 17, 2008, <http://www.publications.parliament.uk/pa/cm200809/cmhansra/cm081217/halltext/81217h0001.htm>. In his remarks, MacShane stated that, "[a]s in the 18th century, the British establishment is seeking to silence Americans who want to reveal the truth about the murkier goings-on in our independent world. The practice of libel tourism as it is known - the willingness of British courts to allow wealthy foreigners who do not live here to attack publications who have no connection with Britain - is now an international scandal. 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 that banal phrase is a major assault on freedom of information, which in today's complex world is more necessary than ever."

### Non Enforcement of British Libel Judgments by U.S. Courts

No federal law or standard exists for the recognition and enforcement of foreign country judgments in the United States.<sup>46</sup> While judgments of sister states are regulated by the Full Faith and Credit Clause of the U.S. Constitution, foreign country judgments are not.<sup>47</sup> The United States is not currently a party to any treaties or international agreements governing the recognition and enforcement of judgments rendered by the courts.<sup>48</sup> Congress has the authority to enact legislation that would prohibit the recognition and enforcement of foreign declaratory judgments if those judgments are inconsistent with the First Amendment.

I was involved in the only two decisions where American courts have refused to enforce English libel judgments on the broad ground that England's libel laws are repugnant to the fundamental protections afforded by the First Amendment and state constitutional law.<sup>49</sup>

#### *Bachchan v. India Abroad*

In *Bachchan v. India Abroad Publications, Inc.*, *India Abroad*, a small New York based publication reported that, according to Sweden's leading newspaper *Dagens Nyheter* ("DN"), kickbacks from arms sales to the Indian government had been deposited into the Swiss bank account of Indian national Ajitabh Bachchan. Bachchan, a close friend of then-Prime Minister Rajiv Ghandi, also served as business manager to his brother, Amitabh Bachchan, who at the time was India's leading Bollywood star. As a result, Ajitabh Bachchan was a well known public figure to Indians around the world. Bachchan sued both *DN* and *India Abroad* for libel in England. Although *India Abroad* was distributed overwhelmingly in the United States, Bachchan (an Indian national claiming London residency) sued *India Abroad* for libel in England based on distribution of 1,000 copies of a wire version of the *India Abroad* story.<sup>50</sup> Bachchan and *DN* (the original source of the story) subsequently entered into a settlement in which *DN* apologized, saying that it had been the "unwitting victim of a story planted by some unscrupulous...persons in India." Even though *India Abroad* (as well as every other

<sup>46</sup> A proposed federal statute creating a uniform national rule for enforcement of foreign country judgments has been adopted by the American Law Institute (ALI). See American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute; Adopted and Promulgated by the American Law Institute, May 15, 2005 (2006), <http://www.silha.umn.edu/Bulletin/Fall%202008%20Bulletin/House%20Passes%20Libel%20Tourism%20Bill;%20Illinois%20Enacts%20Its%20Own%20Law.html>.

<sup>47</sup> *Hilton v. Guyot*, 159 U.S. 113, 181-82 (1895).

<sup>48</sup> The Hague Convention on Choice Agreements would require Convention parties to recognize, with some exceptions, judgments rendered by a court in another signatory country that was designated in a choice of court agreement between litigants. The Convention would likely apply to defamation judgments. The United States has not yet ratified the Convention, which to date has not entered into force.

<sup>49</sup> *Bachchan v. India Abroad Publ'ns, Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) and *Matusevitch v. Telnikoff*, 702 A.2d 230 (Md. 1997).

<sup>50</sup> This number represented approximately 2% of the total of copies of *India Abroad* distributed. Ninety-one point two percent (91.2%) of the copies were distributed in the United States. *India Abroad* had a U.K. subsidiary and a London office.



major Indian newspaper and wire service) had relied in good faith on *DN's* reporting of the story, and even though Bachchan was a public figure, he was not required to prove any fault by *India Abroad* (not even negligence) under English common law. Instead, *India Abroad* was held strictly liable in England to the tune of £40,000 for publishing a story based on another paper's "unwitting" error.

Bachchan had considerably less luck enforcing his judgment in the United States. Fresh off his victory in the English court system, Bachchan subsequently instituted a proceeding in a New York state trial court to enforce his English award against *India Abroad*. I was retained by the late Gopal Raju to represent *India Abroad* in the New York proceeding. Finding English libel law fundamentally at odds with First Amendment jurisprudence, the court declined enforcement on the public policy grounds that the enforcement of a British libel judgment in the United States is repugnant to American public policy:

*It is true that England and the United States share many common law principles of law. Nonetheless, a significant difference between the two jurisdictions lies in England's lack of equivalent to the First Amendment. The protection to free speech and the press embodied in [the first amendment] would be seriously jeopardized by entry of foreign libel judgments pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded to the press by the U.S. Constitution.*<sup>51</sup>

Had this case been brought in an American court, the case would have been dismissed at the outset on the grounds that *India Abroad* had relied on a reputable news organization.<sup>52</sup>

#### ***Matusevitch v. Telnikoff***

The Maryland high court reached a similar conclusion in *Matusevitch v. Telnikoff*. In *Telnikoff*,<sup>53</sup> Soviet émigré turned English citizen Vladimir Ivanovich Telnikoff complained in an op-ed published in London's *Daily Telegraph* that the BBC's Russian Service employed too many "Russian-speaking national minorities" and not enough of "those who associate themselves ethnically, spiritually or religiously with the Russian people." This op-ed prompted an angry letter to the editor (also published in the *Telegraph*) from Soviet Jewish émigré Vladimir Matusevitch who protested that Telnikoff was advocating a "switch from professional testing to a blood test" and was stressing a "racialist recipe" under which "no matter how high the standards 'of ethnically alien' people, they should be dismissed."<sup>54</sup> The letter written by Matusevitch, an American citizen by birth who, at the time, was living in London, working for Radio Free Europe, was a classic example of the heated hyperbole uttered in the course of

<sup>51</sup> *India Abroad*, 585 N.Y.S.2d at 684.

<sup>52</sup> Sack, *Sack on Defamation*, § 7.3.

<sup>53</sup> *Telnikoff*, 702 A.2d at 251.

<sup>54</sup> *Id.* at 233.

public debate that is protected by the First Amendment in this country as non-actionable opinion. In England, however, such discourse was not protected, and Telnikoff ultimately secured a £240,000 pound award against Matusetivch from a jury, which found that that Matusetivch's letter to the editor conveyed the "fact" that Telnikoff was a racist.

After the decision, Matusetivch returned to the United States, settling in Maryland. When Telnikoff sought to enforce his English judgment against him in the U.S., Matusetivch instituted a civil rights action in federal district court in Washington, D.C. in this action. I represented major American media as *amici* at every level of the U.S. proceedings. The District Court found that the British award was repugnant to Maryland public policy and First Amendment principles. After Telnikoff appealed the district court's decision, the D.C. Circuit certified to Maryland's highest court the question of whether recognition of Telnikoff's English libel judgment would contravene the public policy of the state of Maryland. Reaching a conclusion similar to that of the *India Abroad* court, the Maryland Court of Appeals, by a vote of 6 to 1, broadly held that, "[a]t heart of the First Amendment...is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern...the importance of that free flow of ideas and opinions on matters of public concern precludes Maryland recognition of Telnikoff's English libel judgment."<sup>55</sup>

In *India Abroad* and *Telnikoff*, state courts in New York and Maryland held that recognition of foreign libel judgments in the United States contravened the public policy of not only New York and Maryland, but also the United States. In *India Abroad*, the court went one step further and stated that not only would the court not recognize or enforce Bachchan's libel judgment against *India Abroad*, the court had a constitutional obligation not to: "[i]f, as claimed by defendant, the public policy to which the foreign judgment is repugnant is embodied in the First Amendment to the United States Constitution or the free speech guaranty of the Constitution of this State, the refusal to recognize the judgment should be, and is deemed to be, 'constitutional mandatory.'"<sup>56</sup>

Although *India Abroad* and *Telnikoff* set the precedent that English libel laws were repugnant to the fundamental speech and press protections afforded by the First Amendment and state press laws, more recent efforts to have foreign decisions declared unenforceable have been unsuccessful.<sup>57</sup> The leading case involves Rachel Ehrenfeld who was sued by bin Mahfouz for libel in England based on allegations Ehrenfeld made in her book, *Funding Evil: How Terrorism is Financed—and How to Stop It*. After

<sup>55</sup> *Telnikoff*, 702 A. 2d at 251.

<sup>56</sup> *India Abroad*, 585 N.Y.S.2d at 662.

<sup>57</sup> *Ehrenfeld v. Bin Mahfouz*, No. 06-2228, 2007 WL 1662062 (2d Cir. June 8, 2007). In addition, other attempts to use the Declaratory Judgment Act to prevent recognition of U.K. libel judgments has proved unsuccessful on jurisdictional grounds. See *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357 (2d Cir. 2003) (Dow Jones attempt to bar Harrod's from filing a libel lawsuit in U.K. was dismissed on grounds that the Court did not have personal or subject matter jurisdiction.); *Yahoo! v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (en banc) (9th Circuit sitting en banc dismisses for jurisdictional reasons Yahoo! request for declaratory order preventing enforcement of French Court's order to ISP to block French citizen's access to Nazi material displayed or offered on Yahoo's United States site.)

Ehrenfeld did not appear in the English case, the English court issued a default judgment against her. Bin Mahfouz did not come to the U.S. to enforce the judgment; he instead posted the British judgment on his website as a warning to future authors and reporters. Immediately after the judgment was received, Ehrenfeld filed a complaint in the Southern District of New York seeking a declaration under the Declaratory Judgment Act, 28 U.S.C. § 2201, asking the court to declare that (1) bin Mahfouz could not prevail on a libel claim against Ehrenfeld under the laws of New York and the United States; and (2) the judgment in the English case was not enforceable in the United States on constitutional and public policy grounds. Following dismissal on jurisdictional grounds, the Second Circuit certified the jurisdictional question to the New York Court of Appeals.

Answering the question certified to it by the Court of Appeals for the Second Circuit, the Court of Appeals found that the “[t]he mere receipt by a non-resident of a benefit or profit from a contract performed by others in New York is clearly not an act to confer jurisdiction under our long-arm statute.”<sup>58</sup> According to the Court of Appeals, bin Mahfouz’s contacts with Ehrenfeld were necessary to receive the benefit of his judgment. The Court of Appeals acknowledged the problem of libel tourism, but stated that “however pernicious the effect of this practice may be, our duty here is to determine whether [bin Mahfouz]’s New York contacts establish a proper basis for jurisdiction” and bin Mahfouz’s contacts did not meet that threshold. Plaintiff’s arguments regarding the enlargement of CPLR 302(a)(1) to confer jurisdiction upon “libel tourists” must be directed to the legislature.

New York and Illinois responded to the Ehrenfeld Court’s call to act by passing legislation which would provide authors, publishers and media outlets in those states protection from threats of local enforcement of libel tourism. Illinois and New York have passed laws that give residents the right to file a complaint in the courts of those states to have foreign libel judgments declared unenforceable if issued by courts where free-speech standards are lower than those in the United States.<sup>59</sup> These extend the state’s long arm jurisdiction to any person who obtains a judgment in a defamation proceeding outside the United States.

### **Impact on Publishing Decisions**

Without the passage of this legislation, libel tourism threatens to have a significant “chilling effect” on the expressive activities of American authors, publishers, media organizations and non-governmental organizations. The Internet age of global satellite and electronic communications has produced a world without borders. Today, any book, article, television newscast or blogpost available online, even one published exclusively in another country, can ostensibly be subject to the libel law of a foreign jurisdiction.

<sup>58</sup> *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830 (N.Y. 2007).

<sup>59</sup> See Governor Paterson Signs Legislation Protecting New Yorkers Against Infringement Of First Amendment Rights By Foreign Libel Judgments, May 1, 2008, [http://www.ny.gov/governor/press/press\\_0501082.html](http://www.ny.gov/governor/press/press_0501082.html); 735 Ill. Comp. Stat. 5/2-209.

U.S. publishers my firm represents now routinely get letters on behalf of U.S.-based celebrities and businessmen simultaneously from both U.S. and British law firms threatening lawsuits in the United Kingdom if the U.S. publisher decides to publish an article the celebrity feels is defamatory. If the publication has already been published, confronted with the possibility of a claim in the U.K. where the law so favors the plaintiff, U.S. publishers are settling claims that would never succeed in the U.S. With the enormous economic constraints currently faced by newspapers and magazines, they cannot possibly incur the risk. Fear of a lawsuit by members of the Saudi Royal Family prevented publication in the United Kingdom of *House of Bush, House of Saud* by Craig Unger and *While America Slept: The Failure to Prevent 9-11*, by Gerald Posner, even though both books were cleared for publication and published in the United States and the information was of equal importance to a worldwide, not just domestic, audience.<sup>60</sup>

In Britain, the losing party must bear the fees of the prevailing party, as well as his own. The fees often far exceed by several multiples any damages award, since each party in the typical libel matter is represented by two barristers and two solicitors, at a minimum, and the fees typically run to 1 million dollars for each side.<sup>61</sup> Since the law so favors the plaintiff, the likelihood of a substantial fee award to the prevailing plaintiff only magnifies the burden faced by any defendant sued in a U.K. court. This is further compounded by the fact that jurisdiction lies wherever the publication is found. *Forbes* magazine is facing three separate claims arising out of the same article (about a marathon in the North Pole) published in its U.S. edition, brought in Ireland, Northern Ireland and England. The Belfast-based solicitor who brought the triple play has bragged to Dublin's *Sunday Tribune*: "Facing three separate legal costs and possible damages can be effective in terms of concentrating a publisher's mind and encouraging early settlement."<sup>62</sup>

#### **LEGISLATIVE PROPOSAL**

H.R. 6146 is a strong measure effectively codifying on a federal level the two state courts decisions in *Bachchan* and *Telnikoff* which applied the provisions of the Uniform Foreign Money Judgments Recognition Act in effect at the time. The legislation sponsored by Chairman Cohen and passed by the House of Representatives in the 110th Congress last September is a much needed step toward ending the practice of forum-shopping by U.S. celebrities, foreign business tycoons, those suspected of supporting terrorism, or anyone seeking laws that lack the protections afforded the First Amendment to wield against U.S.-based authors, publishers, broadcasters and web publishers. By focusing on actions by public figures or matters of public concern, the legislation reaches public speech at the core of the First Amendment.

<sup>60</sup> Ron Chepesiuk, *Libel Tourism Chills US-Based Investigative Journalism*, The Daily Star, Apr. 30, 2004, <http://www.thedailystar.net/2004/04/30/d404301501109.htm>.

<sup>61</sup> *Writ Large*, The Economist, Jan. 8, 2009, [http://www.economist.com/world/international/displaystory.cfm?story\\_id=12903058](http://www.economist.com/world/international/displaystory.cfm?story_id=12903058).

<sup>62</sup> Suzanne Breen, *She's Just Jenny from the H-Blocks to Lawyer Tweed*, Sunday Trib., Aug. 31, 2008, <http://www.tribune.ie/news/international/article/2008/aug/31/shes-just-jenny-from-the-h-blocks-to-lawyer-tweed/>.

While it is a most important first step, there are a number of concerns that the legislation, as valuable as it is, leaves unaddressed. Many of the larger news organizations have assets overseas against which foreign libel judgments can be enforced. As a result, the successful overseas libel plaintiff need not come to the U.S. to enforce an otherwise unenforceable judgment against a larger media entity.

Even if there are no assets overseas, the successful libel plaintiff may choose to avoid the obstacles of enforcement in the U.S. but nonetheless use the judgment of the foreign court to discourage any further reporting about the controversy. Many media organizations will be fearful of publishing in face of a libel verdict that holds that the statements are not true, even if that verdict is the product of laws that would not have been applied in the U.S. and, even worse, the product of a process where the U.S.-based author or publisher did not appear to defend. That is, indeed, what happened in the *Ehrenfeld* case. Mr. bin Mahfouz posted his verdicts on his website as a warning sign to discourage future reporting. It has had the predictable effect, resulting in Cambridge University Press destroying its book, *Alms for Jihad*, on the subject.<sup>63</sup>

Finally, the absence of the various protections for speech is magnified several fold by fee-shifting that is standard in the U.K. for a prevailing party but is contrary to the American rule. The fees are typically several multiples of any verdict and, of course, the fees are times two since the losing party must bear his own as well as those of the prevailing parties!

To address these concerns, I suggest one or more of the following additions to the current legislation:

1. Add a remedy for declaratory judgment. This remedy could be added without expanding the jurisdictional due process constraints that would normally apply. Even with the due process constraints, libel plaintiffs who file overseas but are based in the U.S., have substantial contacts in the U.S., or take actions making suit in the U.S. foreseeable, would be subject to a declaratory judgment action in the U.S., even if they do not come to the U.S. to enforce the judgment.

2. Add an award of fees and costs to the party who has been sued in an overseas action and who prevails in the domestic court, so that they can recoup all reasonable attorney's fees and costs, including those incurred in connection with the overseas action. This would be akin to the fee provisions of anti-SLAPP statutes that have been passed in 25 states to discourage suits that are intended to burden speech.<sup>64</sup>

<sup>63</sup> See [http://www.binmahfouz.ufo/news\\_20070730.html](http://www.binmahfouz.ufo/news_20070730.html). Bin Mahfouz sued Cambridge University Press for libel relating to allegations contained in *Alms for Jihad*. Rather than go to trial, Cambridge University decided to settle, agreeing to pulp all unsold copies of the book.

<sup>64</sup> We count 25 states and one territory with anti-SLAPP statutes: Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Washington and Guam. Adapting the structure from California's Anti-SLAPP Statute, the party resisting a foreign libel judgment would be able to make a special motion within 60 days requiring the party seeking to enforce the judgment to make a *prima facie* showing that the judgment was consistent with

3. Require that a bond be posted by the party seeking to enforce the overseas judgment.

### **CONCLUSION**

The judges in *Bachchan* and *Matusevitch* and the legislatures in New York and Illinois have recognized the dangers posed by enforcement of foreign judgments inconsistent with the principles secured by the First Amendment. The passage of H.R. 6146 by Congress is a necessary step to restore to American authors, publishers, booksellers and other members of the media the speech rights that they have long enjoyed in this country.

I thank you for the opportunity to speak to you today and look forward to answering the questions of the Committee and working with the Committee in the future on this legislation.

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the First Amendment. If the party resisting enforcement were successful, that party would be awarded attorney's fees and costs. If the movant was unsuccessful, the party seeking to enforce the judgment would only be awarded fees if the motion were frivolous.

Mr. COHEN. Thank you.  
Professor Silberman, you are recognized.

**TESTIMONY OF LINDA J. SILBERMAN, PROFESSOR,  
NEW YORK UNIVERSITY SCHOOL OF LAW**

Ms. SILBERMAN. Thank you.

I would first like to thank you, Chairman Cohen, and the Subcommittee for inviting me to testify on this subject about which I have been thinking and writing for decades, and that is the recognition and enforcement of foreign judgments more generally.

And I am delighted to see that this topic is going to be addressed at the Federal level.

You may have seen the ALI project that I did with my colleague, Professor Lowenfeld, which offers a somewhat more comprehensive proposal for a Federal statute governing the recognition and enforcement of judgments more broadly. The ALI project represents the position of the Institute, but my statements and my written testimony are those of myself only.

In the short time that I have, I would like to just make two points: one, the need for Federal law on this subject; and secondly, some suggestions about the libel tourism bill. As I said, I think the subject of recognition and enforcement of foreign judgments should be a subject of national, Federal law. And libel tourism is only one aspect of that.

The United States has no bilateral or multinational treaty dealing with the recognition or enforcement of foreign judgments. And unlike the full, faith and credit obligation, which is owed to sister-state judgments, foreign country judgments are not subject to any constitutional or statutory requirement of recognition.

Now, it is a curious history why the law on recognition of and enforcement of foreign country judgments has been treated as a matter of State law, especially when the only Supreme Court case on this subject says that it is a matter of relations between the United States and the foreign state.

But because it has been left to State law, the same foreign judgment may be recognized and enforced in one State, and not in another. And the attempt at uniformity has been unsuccessful, because although they have used the Uniform Act, it has not been adopted by everyone. The adoptions, when they have occurred, are not uniform, and interpretations by State courts are not uniform. And I give in my written statement the example of the reciprocity requirement required by some States and not by others.

So, a Federal law in this entire area is desirable. And I understand that this may be a first step.

The second is on what to do about addressing the specific problem of libel tourism.

H.R. 6146 is really a specific application of the principle adopted in every State of the United States, and indeed, principles adopted by almost every country, that a foreign country judgment may be refused recognition on grounds that the judgment is repugnant to the public policy of the enforcing State. And as we have heard, public policy has been used by States to refuse recognition and enforcement of a judgment.

H.R. 6146 would make clear that, as a national matter, first amendment concerns trump the more general policy of recognizing and enforcing foreign country judgments. And I think this should be done at the national, at Federal level.

My main critique of H.R. 6146, if I may, is that it does not distinguish those cases where, from a private international law and conflict of laws perspective, it is appropriate for courts in the United States to refuse to recognize judgments, and when it is not.

And the example that I used is the *Matusevitch* case, which has already been referred to, because there the libel judgment was obtained by one resident of England against another, both of whom were Russian emigrés.

The libel was in England. The comments were published in an English newspaper. And the U.S. court, as we heard, refused to recognize the judgment, because of fundamental policy differences in U.S. and English law.

But the question to be asked here is, when does a country have interests that are sufficiently implicated to warrant the application of its own policy?

In the *Matusevitch* case, everything took place in England. And, yes, what is at stake are different English and American views about the appropriate balance between defamation protection and free speech. And in the *Telnikoff* case, it is England that has the relevant interest.

There are, of course, other examples where a court in the United States would certainly be justified in concluding that its first amendment concerns should lead to non-recognition. My basic point only is that H.R. 6146 does not contain those nuances.

I have also suggested that a comprehensive approach to recognition and enforcement of judgments would look at issues of jurisdiction, where the English courts are exercising exorbitant jurisdiction. We ought not to be enforcing those judgments. And I think that is a piece missing from the H.R. 6146 as presently drafted.

As you might expect from my earlier comments, I am highly critical of the attempts made in the other bills to authorize jurisdiction and to create a cause of action for declaratory judgment and these more aggressive remedies.

The jurisdictional provisions in those bills, I think, are inconsistent with due process. And I think it is much too aggressive an assertion of U.S. jurisdiction, even in situations where we would say the U.S. interests are compelling.

One need only be reminded of the possibility that an anti-suit injunction by a court in the United States may be met with the response of an anti-anti-suit injunction elsewhere. And I see no reason to elevate the stakes.

And looking, I see my time is over. I just would urge the Committee to look at this issue somewhat more comprehensively in a larger context about the recognition and enforcement of judgment.

Thank you very much.

[The prepared statement of Ms. Silberman follows:]



PREPARED STATEMENT OF LINDA J. SILBERMAN

Statement of Professor Linda J. Silberman  
Martin Lipton Professor of Law, New York University School of Law

Before the Subcommittee on Commercial and Administrative Law  
of the U.S. House of Representatives, Committee on the Judiciary

February 12, 2009

I am Professor Linda Silberman, and I am the Martin Lipton Professor of Law at New York University School of Law, where I have been teaching and writing about Civil Procedure, Conflict of Laws, Comparative Civil Procedure, and Private International Law for over 35 years. With respect to the particular issue of the recognition of foreign country judgments on which this hearing focuses, I was Co-Reporter, along with my colleague Professor Andreas Lowenfeld, of the recently completed (in 2006) American Law Institute Project entitled “Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute”, which offers a comprehensive proposal for a federal statute governing the recognition and enforcement of foreign country judgments. The ALI Project represents the position of the American Law Institute, but this written testimony and my statements today represent only my own views and not those of the Institute or of any group.

Before turning to the particular problem of “libel tourism”, I think it is useful to say a word about the law in the United States relating to the recognition and enforcement of foreign country judgments. Interestingly, the United States has no bilateral or multinational treaty dealing with the recognition or enforcement of foreign judgments. And unlike the full faith and credit obligation which is owed to domestic sister state judgments, foreign country judgments are not subject to the constitutional or statutory

full faith and credit obligation. Even more curious, I think, is the fact that the subject of recognition and enforcement of foreign country judgments in the United States has been treated as a matter of state law. As a result, the judgment of an English or German or Japanese court might be recognized and enforced in Texas, but not in Arkansas, in Pennsylvania but not in New York. In my view, and in the only case in which the Supreme Court of the United States has addressed the subject,<sup>1</sup> a foreign country judgment presented in the United States for recognition or enforcement is an aspect of the relations between the United States and the foreign state, even if the particular controversy involves the rights of private parties. Accordingly, recognition and enforcement of foreign judgments is and ought to be a matter of national federal concern. However, a curious history has left the law of recognition and enforcement of foreign country judgments in the hands of the states,<sup>2</sup> and while a number of (but not all) states have adopted the Uniform Foreign Money-Judgments Recognition Act, even the adoptions are not uniform.<sup>3</sup> For example, some states have included a requirement of reciprocity – that is, the requirement that if a foreign country judgment is to be recognized and enforced in the United States, the foreign country must also respect a United States judgment in similar circumstances. Other states have no such requirement.

<sup>1</sup> See *Hilton v. Guyot*, 159 U.S. 113 (1895).

<sup>2</sup> For a more extensive explanation of how state law became the source of law for the recognition and enforcement of foreign country judgments with a critique of why the question should be viewed as a matter of federal law and national concern, see American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* 1-6 (2006) (hereinafter “ALI Proposed Federal Statute”).

<sup>3</sup> As of 2008, the 1962 version of the Uniform Act – the Uniform Foreign Money-Judgments Recognition Act—is in effect in 30 states and territories of the United States. See Uniform Foreign Money-Judgments Recognition Act (1962), 13 Uniform Laws Annotated Part II (2002 ed. and 2008 Supp.). In 2005, the National Conference of Commissioners of Uniform State Law (NCCUSL) promulgated a revised Act – the Uniform Foreign-Country Money Judgments Recognition Act – that made slight changes to the earlier Act. See 13 Uniform Laws Annotated Part II (2008 Supp.). The 2005 Act replaced the earlier 1962 Act in four states (California, Colorado, Idaho, and Michigan) and was adopted by another (Nevada). See [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-ufcmjra.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufcmjra.asp). A number of other states have introduced bills to adopt the Revised Act.

Moreover, the highest court of each state is the final interpreter of the provisions of its Act, and as a result the Uniform Act is not uniform. These differences in state laws create a situation where a foreign country judgment may be enforced in one state and not in another. Thus, there is no single, uniform American law to govern the recognition and enforcement of foreign judgments.

I applaud the Committee for addressing the subject of recognition and enforcement of foreign country judgments at the national level. Ideally, Congress would identify the principles that guide recognition and enforcement of foreign country judgments and would legislate a national solution in the form of a coherent federal statute. That is indeed the proposal of the American Law Institute Project, which offers a framework for a comprehensive federal statute on the subject of recognition and enforcement of foreign country judgments, and a proposal to which I would urge this Committee to give serious consideration.

Let me now turn to the particular problem of foreign libel judgments in which a foreign court applies a law that is less protective of speech than would be required under United States law, in particular, the First Amendment. The issue may become a matter for the courts of the United States in one of two ways. The successful plaintiff may seek to enforce the foreign judgment in the United States.<sup>4</sup> Or, as several recent cases have illustrated, the defendant against whom the foreign judgment is rendered may seek a declaration in a U.S. court that the judgment should not be recognized, at least in the

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<sup>4</sup> The prevailing judgment plaintiff attempted to enforce an English libel judgment in the United States in *Telnikoff v. Matusevitch*, 347 Md. 561, 792 A.2d 230 (Md. Ct. App. 1997)(on certified question from D.C. Circuit).

United States.<sup>5</sup> Under existing law in every state of the United States --- and indeed under principles adopted by almost every country<sup>6</sup> – a foreign country judgment may be refused recognition on grounds that the judgment is repugnant to the public policy of the state asked to recognize or enforce the judgment.<sup>7</sup> And under existing state law, courts in the United States have refused to recognize foreign libel judgments when they believe First Amendment principles have been violated. Therefore, H.R. 6146, which provides that a domestic court “shall not recognize or enforce a foreign judgment for defamation that is based upon a publication concerning a public figure or a matter of public concern unless the domestic court determines that the foreign judgment is consistent with the first amendment to the Constitution of the United States” does not really change existing law. The provision in H.R. 6146 is more precise than the general “public policy” exception, and it does make clear that as a *national* matter First Amendment concerns trump the more general policy of recognizing and enforcing foreign country judgments. But courts in the United States already consistently invoke First Amendment values in determining whether to deny recognition and enforcement of foreign judgments on grounds of public

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<sup>5</sup> This was the situation in *Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199 (9<sup>th</sup> Cir. 2006)(en banc) and *Ehrenfeld v. Bin Mahfouz*, 518 F.3d 102 (2d Cir. 2008). In both cases, the actions for declaratory judgment were dismissed. In *Yahoo*, a combination of lack of ripeness and lack of jurisdiction led to the dismissal. In *Ehrenfeld*, the case was dismissed for lack of jurisdiction over the foreign judgment plaintiff.

<sup>6</sup> See Linda J. Silberman, *Some Judgements on Judgments: A View from America*, [2008] 19 King's Law Journal 235, 244-48.

<sup>7</sup> There can be different formulations of the “public policy” defense. For example, the 1962 Uniform Act (§ 4(b)(3)) provides that a judgment need not be recognized if the “cause of action”[claim for relief] on which the judgment is based is repugnant to the public policy of this state.” The 2005 Revised Act reads slightly different; it provides that a foreign-country judgment need not be recognized if “the *judgment* or the [cause of action][claim for relief] on which the judgment is based is repugnant to the *public policy of this state or of the United States*.” (Emphasis added). The ALI Proposed Federal Statute provides that “a foreign judgment shall not be enforced in a court in the United States if the party resisting recognition or enforcement establishes that . . . the *judgment or the claim on which the judgment is based* is repugnant to the *public policy of the United States*, or to the *public policy of a particular state of the United States when the relevant legal interest, right, or policy is regulated by state law*.” (Emphasis added).

policy.<sup>8</sup> Indeed, courts have invoked *state* policy as well as federal policy, and thus it may be necessary to clarify that the federal policy here is preemptive.<sup>9</sup>

More critically perhaps, the proposed provision does not solve the private international law aspects of the proper scope for “public policy” when that exception is invoked. Specifically, it does not distinguish situations where it would be appropriate for courts in the United States to recognize and enforce a foreign libel judgment from those where recognition and enforcement should be refused. Let me illustrate with the example of the *Telnikoff v. Matusevitch* case.<sup>10</sup> There, a libel judgment was obtained by one resident of England (Telnikoff) against another resident of England (Matusevitch), both of whom were Russian émigrés. The libel was first contained in a letter written by Matusevitch, which accused Telnikoff of being a racist hater. Later the comments were published in an English newspaper. The court in *Telnikoff* refused to enforce the English judgment because it found that Maryland and English defamation law were rooted in fundamental public policy differences concerning the First Amendment’s protection for freedom of the press and speech. Even if one accepts the point that the differences in the libel laws of England and the United States are such that they meet the

<sup>8</sup> See, e.g., *Sarl Louis Feraud International v. Viewfinder, Inc.*, 489 F.3d 474 (2d Cir. 2007); *Telnikoff v. Matusevitch*, 347 Md. 561, 792 A.2d 250 (Md.Ct.App. 1997)(on certified question from D.C. Circuit); *Bachchan v. India Abroad Publications*, 585 N.Y.S. 2d 661 (Sup.Ct. N.Y. 1992).

<sup>9</sup> The certified question to the Maryland Court of Appeals from the Court of Appeals of the District of Columbia Circuit in *Telnikoff v. Matusevitch*, 347 Md. 561, 702 A.2d 230 (Md. Ct. App. 1997) was “whether recognition of an English libel judgment would be repugnant to *the public policy of Maryland.*” (Emphasis added). In *Telnikoff*, the parties agreed in oral argument that they viewed the case as being controlled by the First Amendment. In resting its decision on Maryland public policy as it was required to do under the Maryland certification legislation, the Maryland Court of Appeals observed that it was “appropriate to examine and rely upon the history, policies, and requirements of the First Amendment.” The question of “federal” or “state” policy was potentially relevant because Maryland public policy arguably protected defamation even where the First Amendment did not. But the public policy relating to the First Amendment should be national public policy, and state public policy should be subordinated to national policy in a case such as this. For more on the proper relationship between state and federal policy in the context of a federal standard for recognition and enforcement of foreign judgments, see ALI Proposed Federal Statute § 5(a)(vi) and comment *h*, at 62-64.

<sup>10</sup> 347 Md. 561, 702 A.2d 230 (Md.Ct.App. 1997).

very high bar that is usually required to satisfy the “public policy” exception, there is a more serious objection here. The question to be asked is: when does a country itself have interests that are sufficiently implicated to warrant application of its own public policy? Let me elaborate further. In *Telnikoff*, neither of the parties nor the transaction had any connection to the United States at the time of the transaction or the proceedings in England. The only nexus with the United States was the fact that the judgment debtor eventually moved to the United States and had assets there.

One can imagine a finite number of situations where there would be an international consensus about norms that would deem recognition or enforcement of a judgment to violate public policy without looking to any territorial nexus. However, in a case like *Telnikoff*, what is at stake are differing English and American views about the appropriate balance between protection of reputation and free speech. And in the *Telnikoff* example, it is England that has the relevant policy interests with respect to these parties and the transaction in question. In a traditional conflict-of-laws analysis, the United States would have “no interest” in applying its standards of behavior and recovery to these parties. Therefore, it seems inappropriate for U.S. standards to be invoked as a public policy defense in a recognition/enforcement context. That view was expressed by the dissenting judge in the *Telnikoff* case who concluded his dissent with the following observation:

Public policy should not require us to give First Amendment protection . . . to English residents in publications distributed only in England. Failure to make our constitutional provisions relating to defamation applicable to wholly internal English defamation would not seem to violate fundamental notions of what is decent and just and should not undermine public confidence in the administration of law. The Court does little or no analysis of the global public policy considerations and seems inclined to make Maryland libel law

applicable to the rest of the world by providing a safe haven for foreign libel judgment debtors.<sup>11</sup>

The interests of the United States with respect to recognition and enforcement are far different where a U.S. party publishes in the United States and distributes a work both in the United States and abroad and then is sued in a foreign jurisdiction for libel under the more stringent defamation laws of that country. In such a case, both the foreign jurisdiction and the United States would seem to want their respective policies applied, but the United States would be justified in concluding that its First Amendment concerns should lead to non-recognition of a judgment if the rendering court did apply foreign law. There could be disagreement on this point because principles of comity have generally led courts in the United States to enforce foreign country *judgments* in situations where they would *apply a different law* were the case brought in a U.S. court in the first instance. But in the above hypothetical, invocation of the public policy exception would probably be appropriate at the recognition/enforcement stage, if the foreign judgment substantially undermined protective speech in the United States.<sup>12</sup> There are other cases that are more complicated. For example, if a U.S. party directly and intentionally publishes and distributes material solely in a foreign country, that country may have the

<sup>11</sup> *Telnikoff v. Matusevitch*, 347 Md. 561, 621-22, 702 A.2d 230, 250-51 (Md. Ct. App. 1997)(Chasanow, J., dissenting).

<sup>12</sup> *Bachchan v. India Abroad Publications*, 585 N.Y.S. 2d 661 (N.Y. Sup. Ct. 1992) is a slight variation. In *Bachchan*, an Indian plaintiff brought suit in England against a foreign news agency operating in New York and elsewhere that had distributed a news story about misconduct in India that was carried in both England and New York. The New York state trial court refused to enforce the English libel judgment on the ground that enforcement of the judgment would violate the First Amendment. There are differences of view here with respect to the propriety of invoking the public policy exception in these circumstances. Compare *Kyu Ho Youm, Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law*, 16 *Hastings Comm. & Ent. L.J.* 235 (1994)(pointing out that U.S. libel law offers publishers significantly more protections than does English law) with Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 *Brook. L. Rev.* 999, 1033-34 (1994)(criticizing *Bachchan* because England had the relevant interest in applying its law of defamation to this case).

stronger interest in having its own law applied, and the U.S. should, in the interests of comity, enforce that judgment.<sup>13</sup>

I do not take a firm position with respect to whether the judgments described in any of these last examples should be enforced, but they illustrate my point that H.R. 6146 fails to contain any nuance for these private international law concerns. The bill may encourage U.S. courts to apply U.S. law principles without regard to context and to invoke public policy too reflexively without sufficient regard for the competing interests of other countries. The danger is then that this provision will invite “libel tourism” in reverse -- where courts in the United States impose the United States view of free speech on the rest of the world regardless of the particular circumstances. The United States would then be engaging in the precise behavior of which it has been so critical.

I do believe that if the federal legislation were better able to articulate a nuanced and uniform national standard – thus offering the possibility of Supreme Court superintendence of such a standard – it would be preferable to the patchwork of solutions that are likely to be created at the state level.<sup>14</sup> But I return to the point I made at the

<sup>13</sup> Cf. *Desai v. Hersh*, 719 F. Supp. 670 (N.D. Ill. 1989), *aff’d*, 954 F.2d 1408 (1992).

<sup>14</sup> Two states, New York and Illinois, have passed their own “libel tourism” laws. In 2008 New York amended its version of the Uniform Act to provide that a defamation judgment obtained outside of the United States need not be enforced unless the court in New York determines that the defamation law applied by the foreign court provides “at least as much protection for freedom of speech and press . . . as would be provided by both the United States and New York Constitutions.” CPLR §5304(b)(8)(2008). In addition, New York amended its jurisdictional statute, CPLR §302(a), to provide that any person who obtains a judgment in a defamation proceeding outside the United States against a New York resident or person amenable to jurisdiction in New York with assets in New York is subject to jurisdiction in New York for the purpose of obtaining declaratory relief, provided the alleged defamatory publication was made in New York and the person against whom the judgment was rendered has assets in New York or may have to take action in New York to comply with the judgment. Illinois amended its version of the Uniform Foreign Money-Judgments Recognition Act to add an additional ground for non-enforcement: “when the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless a court sitting in this State first determines that the defamation law applied in the foreign jurisdiction provides at least as much protection for freedom of speech and the press as provided for by both the United States and Illinois Constitutions.” 735 ILCS 5/12-621(b)(7)(2009). Illinois also amended its jurisdictional statute to allow for jurisdiction over Illinois residents for the purpose of rendering declaratory relief provided the publication was published in Illinois and the resident has assets in Illinois to satisfy the



outset of my remarks – the need generally for a broader solution on the national, indeed the international level, and one that belongs in the hands of Congress.

Let me offer an example of why a more comprehensive approach to recognition and enforcement of foreign judgments is desirable. There are other defenses that might be asserted to refuse recognition and enforcement of these “libel tourism” judgments that would take account of the jurisdictional excesses of foreign courts. When a foreign court exercises jurisdiction over a U.S. defendant in what might be regarded as an exorbitant assertion of jurisdiction (in a defamation case or any other), generally accepted principles of law in the United States relating to the recognition and enforcement of foreign judgments provide that such a judgment should not be recognized or enforced.<sup>15</sup> Thus, it is not only the defense of “public policy” but also the defense of an “unreasonable assertion of jurisdiction” that might be used to prevent recognition and enforcement of a foreign defamation judgment that is thought to undermine fundamental U.S. interests. However, H.R. 6146 concerns itself with only a very small piece of the more general problem of recognition and enforcement of foreign country judgments and does not address other relevant aspects.

As you might expect from my earlier comments, I am highly critical of the attempts made in H.R. 5814 and S. 2977 to authorize jurisdiction and to create a cause of action for a declaratory judgment and other relief on behalf of “any United States person” who is sued for defamation in a foreign country if such speech or writing by that person “has been published, uttered, or otherwise disseminated in the United States.” As I indicated above, the attempt to impose the standards of U.S. defamation law on the rest of

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judgment or may have to take action in Illinois to comply with the judgment. 735 ILCS 5/2-209(b)(5)(2009).

<sup>15</sup> See, e.g., Uniform Foreign Money-Judgments Recognition Act § 4(a)(2).

the world goes too far in many situations, and the reach of this provision fails to give proper respect to the interests of other countries. The jurisdiction provision in the bills that purports to assert jurisdiction over any person who has brought a foreign lawsuit against a “U.S. person” (when speech has also been published or disseminated in the United States) is constitutionally problematic under the Due Process Clause of the Fifth Amendment. A person who brings a lawsuit in a foreign country and serves a defendant in the United States does not engage in the kind of “purposeful conduct” directed to the United States that the Supreme Court has required to meet the constitutional standard of “minimum contacts” and “reasonableness” for asserting jurisdiction.<sup>16</sup> Finally, in addition to the remedy of a declaratory judgment provided by H.R. 5814 and S. 2977, these bills offer more extreme and ultimately unsustainable remedies -- a “clawback” of damages recovered in the foreign judgment, an anti-suit injunction, and an award of treble damages in certain circumstances. These tools are much too aggressive an assertion of U.S. jurisdiction even in those situations where U.S. interests might be found to be compelling. One need only be reminded of the possibility that an anti-suit injunction by a court in the United States may meet with the response of an anti-anti-suit injunction in the foreign court to realize that accommodation of competing policies is best achieved in other ways.<sup>17</sup>

One should not assume that other countries are oblivious to the concerns of the United States with respect to global defamation. Where the interests of the foreign country are minimal, we have seen foreign courts abstain and/or refuse jurisdiction to

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<sup>16</sup> See *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987).

<sup>17</sup> See Andreas F. Lowenfeld, *Forum Shopping Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 Am J. Int'l L. 314 (1997).

hear a libel case against a U.S.-based publisher.<sup>18</sup> Also, recent developments in Europe, such as the European Convention on Human Rights and the International Covenant of Civil and Political Rights are having an impact on the libel laws of many countries, including England,<sup>19</sup> and may result in greater sensitivity to principles akin to the First Amendment.<sup>20</sup>

I believe a comprehensive federal statute is the best solution to address the important and complex issues relating to the recognition and enforcement of foreign country judgments, including the particular issue of interest to this Committee – the problem of “libel tourism”. It may well be that even national law will fall short in dealing with the problems arising from transnational libels and that only an international solution can ultimately address an issue that has become as global as the Internet itself.<sup>21</sup> But to the extent that Congress seeks a solution, it should do so by developing a broader proposal for federal law on the recognition and enforcement of foreign judgments and viewing the issues in the context of the foreign relations concerns of which they are a part.

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<sup>18</sup> See *Jameel v. Dow Jones & Co., Inc.*, [2005] EWCA (Civ) 75 (staying libel action brought by Saudi claimants against the U.S.-based Dow Jones where only 5 subscribers in England had accessed the hyperlink disclosing claimants’ names); *Bangoura v. Washington Post* [2005] D.L.R. (4<sup>th</sup>) 341 (holding that Ontario trial court could not exercise jurisdiction over Washington Post for allegedly libelous statements posted on its website where plaintiff was not an Ontario resident at the time the article was written).

<sup>19</sup> See, e.g., the recent decision of the House of Lords, *Jameel v. Wall Street Journal Europe* [2006] UKHL 44, [2007] 1 A.C. 359 (Eng.), which has been characterized as “moving English defamation law much closer to the American constitutional law of defamation”). See Marin Roger Scordato, *The International Legal Environment for Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law*, 40 Conn. L. Rev. 165 (2007).

<sup>20</sup> See generally Michael Traynor, *Conflict of Laws, Comparative Law, and The American Law Institute*, 49 Am J. Comp. L. 391, 396 (2001).

<sup>21</sup> See *Dow Jones & Co., Inc. v. Gutnick* [2002] HCA 56 (Dec. 10 2002)(Australia)(Referring to the problems of the publication of defamatory material on the internet, Justice Kirby of the Australian High Court observed that the problems “appear to warrant national legislative attention and to require international discussion in a forum as global as the Internet itself.”).

Mr. COHEN. Thank you, Dr. Silberman.

And I will now recognize myself for some questions.

You said there are some nuances in 6146 that you think should be changed, and it relates to this discretion and when to have an action arises to such that it should not be recognized here in our courts.

Do you have language that you could recommend to us that you think would be definitive enough to give guidance to the courts?

Ms. SILBERMAN. Well, I probably ought to think a little bit about that, but something like when U.S. interests are undermined, or U.S. interests are affected.

I mean, we are a system that develops these issues by common law. And there, conflict of law approaches recognize situations in which there are interests.

I think the failure to give any kind of nuance here, something like when U.S. interests are affected, would allow judges to find those situations and avoid, with all respect, the *Matusevitch* case, which I myself think is an inappropriate use of the public policy exception. I mean, we probably differ in this group, but that is my view. And I think the interests there of England, however much we disagree with them, are appropriate.

Mr. COHEN. You mentioned the other bills that have been introduced on the subject.

Do you know of any precedents for a cause of action in American law being created by something happening in a foreign jurisdiction, in law—

Ms. SILBERMAN. Well, I do not know of a—

Mr. COHEN.—in a court?

Ms. SILBERMAN. I do not know of a bill that has moved that way. Certainly, things can happen in a foreign country that affect persons in the United States. And depending upon what those persons have done. I mean, the—

Mr. COHEN. But I do not mean what people have done as much as a foreign court's actions. Have the actions in a foreign court ever been such that they have been the cause for action in the United States in a court system as a response?

Ms. SILBERMAN. Well, of course we know the Yahoo! case in which the court ultimately dismisses that case. That is a case for a declaration—a declaration of non-recognition in precisely this situation—a declaration of non-enforcement, because of the judgment rendered by the French court against Yahoo!

And I have to confess that I was—I had some consultations with Yahoo! in that situation. And indeed, I had suggested that an appropriate course might be a declaration of non-enforcement. And at the time I said, but I think there is serious question about whether or not you can get jurisdiction.

At the time, I really did not have all of the facts. But the mere situation of bringing a suit because process is served on an American defendant is generally not thought to be a sufficient basis of jurisdiction.

In the Yahoo! case we have a split decision in which the judges of the 9th Circuit on rehearing en banc, the majority of the judges thought that that would be enough. But a combination of judges who thought it would not enough, and concerns about ripeness—

that is, that the threat was not immediate, there was no suggestion that they were going to try and force the judgment—led to the dismissal of the case.

I mean, it is unfortunate, I think, that that case did not get to the Supreme Court of the United States. And if it did, we might have some guidance on that subject.

Mr. COHEN. And you mentioned some problems with H.R. 5814, and the Senate bill, 2977, which I guess—I think are identical. The problem I take from your testimony, just that it causes us—it is overreaching in its response?

Ms. SILBERMAN. Well, it is two-fold. One, there is a provision on jurisdiction in that bill which I believe is unconstitutional.

I think the notion that you can take jurisdiction, merely because someone who sued in a foreign court, and that same speech has been disseminated somewhere in the United States—I do not think is enough to get jurisdiction over that party who brought suit, used the foreign courts to bring suit, assuming that there was also speech in that country. They have not done anything, necessarily, in the United States—at least as our present jurisdictional principles State.

The second thing I worry a great deal about is the notion of a clawback statute and treble damages. I mean, we have seen the attempted clawback from the other side, when the English passed a clawback statute many years ago in the antitrust area.

Interestingly, that clawback statute has never been used by the English, and I think because they recognize that it is an aggressive attempt at regulating things that we may do in the United States with respect to our views about antitrust. Even if there are foreign defendants who act in the United States, the English do not think they should have treble damages. We do.

The English passed a clawback statute, but it has never been used. And in our relationship with other countries, respect for our differences seems to me to be very important.

It is one thing for us to say, we are not recognizing this judgment, because it affronts our public policy and affects U.S. interests. It seems to me it is perfectly right for us to do that.

It is quite another thing, I think, to take these broad exercises, anti-suit injunctions, treble damages and clawback statutes. It shows no respect for a system that, although different than ours, is certainly a system that owes deference in situations where they have the strong interest.

Mr. COHEN. Thank you, professor.

And I now yield 5 minutes for questions to the Ranking Member, our friend, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And Dr. Ehrenfeld, at the risk of asking a simplistic question, looking at this legislation and recognizing your personal experience, is there some one provision, or one central concept that you would say is most important? And does this bill address that effectively?

Ms. EHRENFELD. I think that, first of all, the principle of the law is good. However, having a law without any teeth, without any deterrence, is not good, because libel tourism will continue.

I am not a lawyer, so I will not argue about the legal aspects of it. But the fact that Mr. bin Mahfouz has a Web site where he advertises—and he is not the only one—all the legal judgments against Americans and others, have a very strong chilling effect.

And I do not think that the first amendment is similar to other civil laws. The United States, as far as I know, is the only country with strong protections of free speech. There is no other country with similar protections.

And I think that should make this law different than all other laws that deal with jurisdiction and reciprocity. That is my opinion about this.

I know that he had probably—not probably, most likely—would have not sued, had he known that this will actually reach Congress. And that is not a deterrent yet, because he is continuing to sue.

And apparently, Mr. Tweed in England, I assume, is the one in Ireland who is suing everybody as long as he can do that.

I think that without teeth the law will do very little. I think it is important to have some measure of deterrent.

Mr. FRANKS. Well, I hope you continue to be involved. And we are sure grateful for you being here today.

Ms. EHRENFELD. Thank you.

Mr. FRANKS. Professor Silberman, my last question is, you know, there is another subject related to libel tourism called religious defamation.

For example, you know, you have authors who publish statements on religious themes under the mantle or provision of free speech, who are later prosecuted by foreign courts for blasphemy.

And I am not suggesting this should be addressed in any way in this libel tourism bill, but there are some commonalities, there are some intrinsic parallels.

And do you have any ideas how we might curtail the prevalence of the religious defamation cases, and what we should do about that, as well?

Ms. SILBERMAN. Well, you are quite right that there.

One could find a number of different issues, where the assertion of jurisdiction and foreign libel, defamation laws affect a much broader set of issues, like the one you mentioned. And in some sense, this approach would address some of those.

You will see it in the intellectual property area, as well. And it is one of the reasons that, you know, I urged a broader bill—I mean, it may fall on deaf ears. You have enough to do. But that, if one went at the subject of the recognition and enforcement of foreign judgment at the Federal level—that is, a comprehensive statute—I think you could address many of these different things.

I think you would get uniform Federal law on this subject. I think you could nuance it sufficiently, so that it would apply when U.S. interests are affected. And I think it would stop the sort of disuniformity that is getting done now with this patchwork of different bills.

Presently, you have a uniform act. Now you have a revised uniform act. Now you have the New York statute. You have the Illinois statute.

This is a problem at the national level. It does involve—whether we differ or not—it does involve the relation between our country and other countries and other courts. And it should be the Congress that takes up and addresses this issue and decides what the appropriate realms of our interests are.

Mr. FRANKS. Thank you, professor.

And Mr. Chairman, thank you. I know that free speech is one of the great core foundations of this country. And I hope that we can be wise in our approach in how we protect it against whatever threats, whether they be foreign or otherwise. And I appreciate the panel for being here, and appreciate the Chairman for making this hearing possible.

Mr. COHEN. Thank you, Mr. Franks.

I now recognize—is there recognition sought by another member of the panel?

Mr. Coble? You are recognized. The gentleman from North Carolina, where Duke was defeated by Carolina.

Mr. COBLE. Thank you. [Laughter.]

Well, now, Mr. Merritt might take umbrage with that, since he is an avid Duke fan.

Thank you, Mr. Chairman. Good to have the panel with us.

Mr. Chairman, I want to thank the Chair for having recognized Pat Schroeder. Ms. Schroeder served as a distinguished Member of this Committee and a distinguished Member of the House of Representatives. And it is good to have you with us, Pat.

And thank you, Mr. Chairman, you and Mr. Price, for having called this hearing.

Dr. Ehrenfeld, are there any other cases that have been brought to your attention where American writers have been sued in other countries for books or works that were written and published in the United States?

Ms. EHRENFELD. Yes. Several authors that have been actually threatened with libel lawsuits by the same Saudi had contacted me when they received the letter, asking me, so, what do you do? How can you defend yourself? What to do?

I also heard from others who not only were threatened to sue, and they had to apologize and retract—not only Americans, Canadians too. But also, people were sued in France by the same Saudi. He has a small industry. He keeps many lawyers busy and well paid.

Yes, I have. And I know that it restricted their ability to publish other books. Especially, they were focused on national security matters, such as terrorism.

Mr. COBLE. Well, I thank you.

Ms. Handman, with regard to Representative King's bill—that is 5814 in the 110th Congress—what triggering mechanism or other factor would provide U.S. courts with personal jurisdiction over a plaintiff who initiates a defamation suit in a foreign court?

Ms. HANDMAN. Well, an awful lot of the cases that we have been talking about, and that we talk about in our—is this on—that we talk about in our papers are actually U.S. citizens, who choose to go overseas to sue. So, there would clearly be jurisdiction over them, because they are U.S.-based.

I think of a lot of the celebrities in Hollywood, for example, or a number of businessmen, U.S. businessmen, who have chosen to sue overseas, because of the favorable laws in England. So, even applying the most traditional due process mechanisms, those kinds of claims would be covered.

And then it reaches further out there. A lot of these international businessmen have dealings in the U.S. You know, the case, for example, involving the Washington Times right now, where they did not publish in the U.K. They only published here, though—no hard copies of the Washington Times in the U.K.

But there were Internet hits—40 of them, or so—in the U.K. That was brought by an international businessman, who was doing business with the provisional government in Iraq, who had many ties to U.S. businessmen. And he would be subject to the very traditional mechanisms of jurisdiction and due process to the claims either in this bill, and with the suggestions I have made to expand the declaratory judgment remedy, and then the existing bill, H.R. 6146, to include a declaratory judgment remedy.

But staying within the jurisdictional limits of due process, I do agree with Professor Silberman, that that obviously is going to be the watchword. But it should be taken to the limits of due process. And it will be for the courts to decide whether someone who sues overseas, who files a lawsuit—who serves process here—has an expectation that he could be foreseeably brought to the U.S. to respond to a suit here.

Mr. COBLE. Okay. I thank you for that.

Mr. Brown, in wake of the potential lawsuits, how would you advise an American writer preparing to write a book or an article or work? What advice or counsel would you extend?

Mr. BROWN. Get libel insurance, right? I mean, that is the—

Ms. EHRENFELD. You cannot—

Mr. BROWN. Yes. The first and foremost response to your question, I can remember hearing Rachel Ehrenfeld talk about her sleepless nights, wondering if the judgment against her would be enforced back in the U.S.

I can recall, when I was representing Mr. Mirza, whose story I discussed in my written testimony, he spent an afternoon in his attic looking for his homeowner's insurance policy, to see if by chance—although he could not remember—but just to see if by chance there was some rider or provision in the policy that would give him coverage in the case that there was a libel judgment or a libel action instituted against him. He, like Dr. Ehrenfeld, was terrified of the potential financial repercussions.

And as Laura and I can both tell you and tell the Subcommittee, when we advise clients who are publishing on any matter of global concern today, whether it is international finance or global terrorism, or anything related to the world of celebrities or high-profile people, you go into it today assuming that you have got to keep your eye on U.S. law, as well as the law of the U.K., because of the growing problem of lawsuits in that jurisdiction.

And I would just like to add one quick note on the personal jurisdiction issue. When we talked—you had asked the question about triggering mechanisms.



There is an analog here, I think, to the alien tort statute, that if Congress were to contemplate creating some kind of substantive cause of action for conduct that took place entirely overseas, the alien tort statute provides a perfect example—and it has been around for 200 years—of Congress creating subject matter jurisdiction for this kind of conduct.

And, under the alien tort statute, there have been cases where foreigners have been served with papers while in the United States. That is one of the truest and surest ways to get personal jurisdiction over someone.

And you may remember that Dr. Karadzic was personally served with an alien tort case when he had just finished dining out at a New York restaurant in the 1990's. And that is a wonderful example of how U.S. law, when it has a bite like a substantive cause of action in the alien tort statute, can ensure that people who visit our country ultimately have to answer to our laws.

Mr. COBLE. Thank you, sir.

Mr. Chairman, I see the red light. Can I put a quick question to Professor Silberman?

Mr. COHEN. Without objection.

Mr. COBLE. I thank you for that.

Professor Silberman, while we are all concerned about foreign suits that raise enormous concerns for American writers, can you tell us whether you are familiar with any foreign libel plaintiffs who were seeking to enforce their judgments here?

Ms. SILBERMAN. I do not know of any offhand. I think maybe some of the other witnesses who do handle these cases are more likely to know than I.

Mr. COBLE. Anyone else want to weigh in on that?

Ms. HANDMAN. The two cases that I—

Mr. COBLE. Briefly, because the Chairman has given me an extra time.

Ms. HANDMAN. Sure. The two cases I was involved in, in Bachchan and *Matusevitch*, they had both come here to the U.S. to enforce that judgment.

So, those are—and then, those decisions came out, and that has had something of an in terrorem effect, I think, discouraging people from coming here. And that leaves Ms. Ehrenfeld in the untenable position she is in, because bin Mahfouz has not come here to enforce the decision. He just has it on his Web site as a cautionary note to all writers who want to write about him.

Mr. COBLE. Oh, gotcha. Okay. Thank you all.

Thank you, Mr. Chairman.

Mr. COHEN. Thank you, sir.

I am going to ask a few more questions, a second round, if anybody else wants to.

But, Mr. Brown, have the English courts ever declined jurisdiction over American authors, under the theory that we have a different standard here, and they take that into consideration at all?

Mr. BROWN. I am not familiar with those cases. There may be one in some of the written testimony, where there have been examples of English courts backing down on personal jurisdiction grounds.

Laura, do you have—

Ms. HANDMAN. Yes. I was an expert in one of them for Barron's in London in the Osicom Chadha case, which I mention in my testimony.

There, they did find jurisdiction over a California technology company and its president. But they exercised forum non conveniens, and dismissed it based on forum non conveniens, which is a discretionary basis, saying that the bulk of witnesses and testimony would be overseas.

That has been more the exception than the rule in London, in my experience in these cases.

Mr. COHEN. Professor Silberman, do you want to comment?

Ms. SILBERMAN. There are some examples with respect to abstention, both in Canada and the United States. The only thing I wanted to say is that, the suggestion that I made about adding to the bill a provision that said we would not recognize a judgment when the foreign court exercised what we might characterize as exorbitant jurisdiction from the U.S. point of view.

And that might well be situations where the publication is in the U.S., and it gets picked up, and there are a few hits on the Internet site. The Europeans, the English, they have jurisdiction in a very different way than we do. They will take jurisdiction in those kinds of cases.

It is true that most of those countries—Australia and England, I know—will issue damages only for the amount of injury that occurs in their jurisdiction, unlike in the U.S. But nonetheless, that has the in terrorem effect that we were talking about.

But a provision that said, when a foreign court exercises a jurisdiction—it exercises jurisdiction on a basis that is perceived as unreasonable in the United States, we would not recognize that judgment.

I think that is, in fact, the law in the various States as well, but its interpretation differs.

Mr. COHEN. Let us assume you sold a lot of books in England, and it was—still, they ruled against you.

Isn't it just as much an infringement on the American belief in your right to express your thoughts? And should not that judgment over there, even though there was a lot of damages there, still should not have—still be unenforceable here, because it is inhibiting our speech?

Ms. SILBERMAN. Yes, if in fact if it inhibits our speech, yes.

I am merely suggesting that there are really two prongs. I was not suggesting jurisdiction as a substitute for public policy. I was really suggesting, as the law is now, that there is a defense on grounds of public policy, and there is a defense on grounds of an unreasonable exercise of jurisdiction.

Mr. COHEN. Dr. Ehrenfeld talked about teeth. If we permitted attorneys' fees, would that not be—I mean, maybe they would be like, you know, tiny, baby teeth. But they would be teeth.

Would that be something that would be okay?

Ms. SILBERMAN. Attorneys' fees—

Mr. COHEN. When you bring the action. You bring an action to—say they want to enforce their judgment, and you are bringing your action under our laws, and it is unenforceable.

And if you are successful in saying that—because they try to bring their action here to enforce their judgment. And they are thwarted because of our law, that then they have to pay attorneys' fees to the prevailing party here.

Ms. SILBERMAN. That is certainly teeth. And we certainly have given awards for prevailing parties in other situations when we deem that necessary. Yes.

Mr. COHEN. Do you both agree, Ms. Handman and Mr. Brown? Something that would be acceptable?

Ms. HANDMAN. Yes, your honor, that is indeed what I—

Mr. COHEN. I like that. But this is America, not England. [Laughter.]

Ms. HANDMAN. Sorry. It is a habit.

Mr. Chairman, yes, that is the amendment that we have suggested. And it would give teeth. And it is very similar to anti-SLAPP statutes, which are now in 25 States, where there are attorneys' fees when someone brings an action that burdens speech, which indeed, this would be a classic example of.

And I would suggest that the attorneys' fees should be able to reach any fees that were encountered in the British action as well, or the overseas action as well, any incurred there. That would put a little extra teeth in it, not just for defending the enforcement action, but also for whatever was incurred overseas.

And in a way, it is only fitting, given that the British have that rule of fee shifting that is in place, and has had a huge impact on American suit over there.

Mr. COHEN. Yes, that caught my attention when it was mentioned in the testimony. And it certainly would be a good—it would be teeth, and it would work with Dr. Ehrenfeld. And then that—you know, I did the SLAPP suit statute in Tennessee.

Ms. HANDMAN. Oh, congratulations.

Mr. COHEN. So, yes. Thank you. A strategic lawsuit against Pickford. And they did not really like that too much.

Mr. Brown?

Mr. BROWN. And maybe I could just add to that. In my written testimony, I discuss the different outcomes involving lawsuits brought against Cambridge University Press in the U.K., and Yale University Press in California. They are both involved in books dealing with the financing of global terrorism.

In the Cambridge case, the books were destroyed. Cambridge capitulated and wrote a very self-serving, apologetic letter to Mr. bin Mahfouz, who was the plaintiff there, which Mr. bin Mahfouz has well publicized.

In the Yale case—Yale was in California—they had access to the California anti-SLAPP statute, which they used, and they filed a motion to dismiss the case. And the plaintiff in that case ended up dismissing, even before the court had an opportunity to hear the anti-SLAPP motion.

And as a colleague of mine pointed out to me just yesterday, the lawyer for the plaintiff in that case said, sounding more like a Harvard quarterback, that "Yale came at us hard." And that is why they decided to drop their action in the face of the anti-SLAPP motion.

So, it is quite effective, that fee-shifting provision there.

Mr. COHEN. Yes, Dr. Ehrenfeld, please?

Ms. EHRENFELD. In the case of Cambridge University Press, interesting to note that the lawyers for bin Mahfouz were asked why did he sue only the publishers and not the American authors of the book. They were not sued.

And he responded that, because Cambridge University is here in England, it is easy to sue. "It is difficult to sue American writers now." This was following the New York legislation.

So, it seems that was a deterrent.

But in spite of what happened in Cambridge, and despite the big publicity, there are the authors—or one author, the living author of Cambridge—of "Alms for Jihad," the book that Cambridge University pulled—cannot get a publisher here in the U.S., because they are afraid that it will reach England, and the publishers do not want to publish it. It is a very good book. It should be published.

In addition, there are—Cambridge University Press actually defamed the authors, the American authors. But they cannot take action against it, because they do not want to get involved in expensive lawsuits.

So, the more deterrence we have, the bigger the teeth, I think, the better it will be.

Mr. COHEN. So, you like the attorneys' fees idea.

Ms. EHRENFELD. I do.

Mr. COHEN. And what if we require kind of a role reversal, the attorneys to give a third of whatever they get back to their client? [Laughter.]

Ms. EHRENFELD. You have to ask the attorneys here. [Laughter.]

Mr. COHEN. That would lose the Bar's support. We cannot do that.

Has English defamation law at all changed and moved more toward our type of first amendment protections, Ms. Handman?

Ms. HANDMAN. Yes, congressman, it has. And I take some small measure of credit for that. I do think the decisions in the U.S. have had that effect, and that is what I am told by my colleagues who practice there.

But it is nowhere near where our law is. The burden of proving truth is still on the defendant.

The Reynolds case, which is the case that has allowed some small measure of fault to be considered, so that if you make a mistake, but if you did all the things that the Reynolds court said—get comment, act fairly, a whole host of, a list of sort of what constitutes responsible journalism—then—and it is a matter of public concern—and they define that very narrowly, so that much of what in America would be deemed a matter of public concern would not fit within that definition—then there, even though you made a mistake, you may well be not liable.

And that was the case in the Jameel case that was recently decided for Dow Jones.

But in that case, even—what it is is a standard very different than what the actual malice standard is. Actual malice is basically deliberate falsehood. It is knowing it is false, or having serious doubts about the truth, and publishing it anyway.

It is basically a bad faith kind of defense, and it is subjective. It is what is in the reporter's head.

It is not a "what do good journalists do" standard, which is more like a negligence standard. That is a lower bar.

But when there are public figures in the U.S., they have to prove that higher bar. And it is intentionally so, because that is the ability to make mistakes, basically, is what *New York Times v. Sullivan* enshrined.

So, they are not anywhere near that. And that is what I hear from my colleagues over there. And that is my own perception. Even the lawyers who got that great decision in the Jameel case say, we are nowhere where you are, even on that false standard.

And also on opinion, they have a sort of reasonableness test. We have, basically, if it is not a statement provable as true or false, it is opinion. And you cannot be sued for it. And then the judge does not get to say whether it is a good opinion or a bad opinion. That is a huge difference also.

And there are many other smaller things like that, in terms of jurisdiction, in terms of statute of limitations, that make a huge difference as well.

But those are the main things, and it is really not anywhere near where we are yet.

Mr. COHEN. Thank you.

Who wants to comment?

Professor?

Ms. SILBERMAN. If I could, just briefly. Of course, they are changing. I think we have seen that. The European Convention on Human Rights and the International Covenant of Civil and Political Rights are having an impact on the laws of many countries.

And I think it is important to remember that when we talk about what I characterized as the nuances, how far we want to go, and who is affected, whether it is a foreign plaintiff, whether it is an English plaintiff who is injured in England.

I mean, we could just take the mirror image. Imagine a place that had no protection for libel law, no defamation law whatsoever. And they publish here, and a U.S. citizen is injured and wants to sue for defamation. It meets with our standards, and so there would be a cause of action, but there would be no protection under the foreign law, and the United States issues a judgment.

I mean, we would think that we had the relevant interest when there was a publication here, and there was a U.S. plaintiff. We would think we had every right to regulate that, regardless of what had been done in the other country.

And so, I just suggest, as I often do in these kinds of cases, for us to stand in the shoes of the other country, and look at where the publication is, who is the resident. All of those things will be relevant in terms of the public policy.

And I think it is important that these changes are occurring, and that there are not quite the same wide gaps of difference in the libel laws.

Mr. BROWN. And I would just add to that. I think—briefly—that the fact that we are here today is something that is putting pressure on U.K. lawmakers.

I think you will see in the written testimony that there have been debates in Parliament quite recently about the phenomenon of libel tourism. And I think there are many M.P.s who are embarrassed by what they see happening in the U.K. courts. And I think the publicity we are giving to the issue today is another thing that will help perhaps reform U.K. libel law.

But the Reynolds defense that Laura mentioned, it is only 10 years old. We have had 45 years' experience under *New York Times v. Sullivan*.

But I would say that, as it has been described by some, as a test in which judges look back after publication and make some kind of evaluation about whether a publication was fair, fairness is not a concept in American libel law.

And for those of us who practice in this area, one of the most famous articulations of that is Judge Leval in the famous Westmoreland case, who said that a publication can be relentlessly one-sided and unfair, and still be protected by the actual malice rule. And I think that, in all likelihood, the Reynolds defense will never catch up with where actual malice is.

And one final point. I think just another twist in U.K. libel law is that they still routinely enjoin authors and publishers. And I think there is nothing more perverse than the fact that Dr. Ehrenfeld here, who made no intent at all to have her book published in the U.K., is now, I understand it, still under an injunction, right, and could be held in contempt of court, if a book that she never intended to be available to a U.K. audience, somehow is published there again, or is available there again.

And I cannot imagine a more perverse miscarriage of justice than that.

Mr. COHEN. Doctor?

Ms. EHRENFELD. Regarding the Jameel case and the changes in the British law, the decision—Lord Hoffman said in that case—and I think the decision was that the measure is how responsible the reporters report. So, who will decide who is a responsible reporter? Should we leave it to the court? That is an important question.

So, I do not think that that is a real movement toward a change, but it is not really change.

Regarding other changes, I understand that the British Bar is now discussing changes in the structure of payment of defendants in libel lawsuits. That is, as far as I know, the changes that they are discussing, but not really about the libel laws themselves.

Mr. COHEN. Thank you. I do not believe there are any further questions.

And if not, I would like to thank all the witnesses for their attendance and their testimony.

Without objection, Members will have 5 legislative days to submit any additional written questions, which we will forward to the witnesses and ask that you answer as promptly as you can. They will be made part of the record.

The record will remain open for 5 legislative days for the submission of any other additional materials. Materials have been forwarded to us, and the request had been made to have them included in the record. And without objection, they will be made so.

A statement from the World Press Freedom Committee with appendices; a letter from John J. Walsh to me; a statement from the American Association of American Publishers; a statement from the American Jewish Congress; and a statement from the American Civil Liberties Union.

Without objection, that is done.

[The information referred is available in the Appendix.]

Mr. COHEN. I thank everyone for their time and patience. This hearing of the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 12:14 p.m., the Subcommittee was adjourned.]





## A P P E N D I X

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MATERIAL SUBMITTED FOR THE HEARING RECORD  
PREPARED STATEMENT OF THE WORLD PRESS FREEDOM COMMITTEE

Statement of the World Press Freedom Committee

To the Subcommittee on Commercial and  
Administrative Law

of the House Judiciary Committee

in connection with Libel Tourism

February 12, 2009

NYA918249.2

The World Press Freedom Committee, a not-for-profit tax-exempt organization, appreciates the opportunity to present its views to the Subcommittee. We applaud the Congressional initiative represented by several bills that seek to address the phenomenon of libel tourism.

Libel tourism, whereby plaintiffs shop for the forum most likely to allow their libel claims irrespective of their nexus with that forum, has been used and abused by powerful and wealthy individuals to suppress news reports they find too critical.

While it is desirable that Congress reaffirms the U.S. policy against enforcing libel judgments that are repugnant to the First Amendment and adopts tools able to uphold that policy, any Congressional initiative must be careful to abide by the due process requirement of the U.S. Constitution, or lest prove ineffective.

Following the New York Legislature's lead,<sup>1</sup> the U.S. Congress is considering legislation to countenance the effects of libel tourism.

We are aware of three bills from the 110th Congress.

Two of them, from the Senate (S. 2977) and the House (H.R. 5814), would have created a cause of action for U.S. citizens sued for defamation in a foreign court on the basis of content published in the U.S. against any physical or legal person that brought the foreign suit if the content at issue in the foreign proceedings would not result in liability under U.S. law. Under these two bills, if the cause of action is met, the plaintiff in the U.S. court would be entitled to seek (i) an order barring enforcement of any judgment resulting from the foreign lawsuit; (ii) damages in the amount of the foreign judgment, costs, including attorneys' fees, borne by the U.S. plaintiff in connection with the foreign lawsuit, and any harm caused by decreased opportunities to publish, conduct research or generate funding; and (iii) treble damages where the person that brought the foreign lawsuit has engaged in a scheme to suppress first amendment rights by discouraging the publication of an author's work.

The third bill, emanating from the House (H.R. 6146), prohibits any state or federal court from recognizing or enforcing a foreign defamation judgment based upon a publication concerning a public figure or a matter of public concern unless the state or federal court determines that the foreign judgment is consistent with the first amendment. This bill would likely extend the scope of the Supreme Court's decisions in *New York Times Co. v. Sullivan*<sup>2</sup> and its progeny. In *New York Times*, the Supreme Court ruled that in order to recover damages for defamation a public official must prove by clear and convincing evidence that the defendant published the allegedly defamatory statement with "actual malice"-that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The Supreme Court's defamation jurisprudence would thereby become the threshold for the recognition and

<sup>1</sup> See Yasmine Lahlou, *Libel Tourism: A Transatlantic Quandary*, to be published in 2009 in the J. INT'L MEDIA & ENT L. for a discussion of New York's Libel Terrorism Protection Act.

<sup>2</sup> 376 U.S. 254 (1964).

enforcement of foreign libel judgments. Some U.S. courts have already adopted that position and refused to enforce foreign libel decisions that were contrary to the First Amendment on the ground they were repugnant to the forum's public policy.<sup>3</sup> This approach merits the Subcommittee's support.

The first two bills raise potential constitutional due process issues because they both purport to give jurisdiction to U.S. courts against defendants who may not have the necessary minimum contacts with the U.S. to be amenable in a U.S. forum. In *International Shoe Co. v. Washington*,<sup>4</sup> the U.S. Supreme Court held that a court may exercise personal jurisdiction consistent with constitutional due process only if the defendant has "certain minimum contacts" with the relevant forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and justice.'" Naturally, such concerns are absent when, as is often the case, the foreign libel judgment was in fact secured by a U.S. personality against a U.S.-based newspaper or journalist.

These two bills also raise substantive fairness issues because the cause of action they create is merely based on the fact that the foreign libel law differs from U.S. defamation law. Thus, irrespective of the legitimacy of his or her foreign libel action, a foreign plaintiff could be subject to a lawsuit in the U.S. and potentially liable for damages merely because a U.S. court could conclude that a publication made abroad regarding a plaintiff abroad would not be actionable under U.S. law. U.S. judges may find it extremely difficult to enforce such provisions.

Libel tourism plaintiffs are able to obtain foreign default libel judgments because defendants are often financially unable to defend the action abroad. One remedy for that situation would be for federal legislation to authorize an award of attorneys' fees to the judgment debtor who prevailed in an enforcement action, declaratory judgment or other proceeding in connection with the foreign judgment.

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**The World Press Freedom Committee** is a not-for-profit, tax-exempt organization established in May 1976. Its purpose is to encourage the development of an unrestricted flow of news and information and the freedom and independence of news media worldwide. The organization accomplishes its purpose by monitoring world press freedom, coordination of press-freedom efforts, participating in and sponsoring conferences to enhance the understanding of international press freedom, producing publications, issuing statements and providing assistance to news media in developing countries and to emerging free news media.

**Yasmine Lahlou** (co-author) is a senior associate in the law firm of Clifford Chance US LLP. Ms. Lahlou specializes in international commercial arbitration and cross-border litigation. Ms. Lahlou

<sup>3</sup> See, e.g., *Bachchan v. India Abroad Publications*, 154 Misc.2d (N.Y. Sup. 1992).

<sup>4</sup> 326 U.S. 310, 315 (1945).

attended law school at Nanterre University in Paris, where she also taught civil procedure, and at the University of Texas at Austin. Yasmine Lahlou is a member of the New York and the Paris bar.

**Richard N. Winfield** (co-author) has served as Chairman of the World Press Freedom Committee for the past three years. Since 2002, he has regularly taught courses in comparative mass media law and American mass media and Internet law at Columbia Law School and Fordham Law School. He leads the media law reform programs of the International Senior Lawyers Project, which he co-founded in 2000. For over three decades Mr. Winfield served as general counsel of the Associated Press (AP) while a partner in the New York law firm of Rogers & Wells, which became Clifford Chance US LLP. There he defended AP and other media clients in many hundreds of press freedom cases in the United States and abroad. Mr. Winfield's articles on freedom of expression have appeared in the Journal of International Media and Entertainment Law, Communications Lawyer and other legal publications.

LETTER FROM JOHN J. WALSH, ESQ., CARTER LEDYARD AND MILBURN LLP

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February 11, 2009

**VIA FAX & ELECTRONIC MAIL**

Honorable Steve Cohen, Chairman  
Subcommittee on Commercial and Administrative Law  
of the Committee on the Judiciary  
1005 Longworth House Office Building  
Washington, DC 20515

Re: "Libel Tourism" Hearing

Dear Chairman Cohen:

I write in connection with tomorrow's hearing of the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee on the subject of "Libel Tourism." I understand the focus of the hearing is the Bill (HR-6146) which you sponsored in the 110th Congress. I also understand that the bill has not yet been reintroduced in the House or, since it passed the House previously, in the Senate in the 111th Congress. As a result, I hope there is time for thoughtful consideration of the points that I -- and I believe others -- will make in this letter and hopefully in future submissions and testimony when the Bill is presented in the 111th Congress for legislative action.

I am a member of the Bar of New York State and have been practicing as a litigator in the Media Law field for more than 28 years. With respect, I believe, in all sincerity, that HR-6146 is a flawed and unnecessary piece of legislation, generated as a reaction to a media and lobbying campaign by Rachel Ehrenfeld and her supporters which is promoting the unproven motion that "libel tourism" is a massive threat to American constitutional values enjoyed by American writers and publishers caused by libel litigation against them in foreign courts. The views expressed in this letter are entirely my own and not those of the law firm where I practice as Senior Counsel.

Since time is short before tomorrow's hearing commences, I hasten to make some points that I would be pleased to expand on during future legislative hearings on your Bill and/or the Bills which were presented in the Senate (S-2977) and House (HR-5814), respectively, during the last Congress. I understand the latter two Bills will be reintroduced in the new Congress.

My concerns are these:

1. HR-6146 is unnecessary. If its goal is to establish a uniform rule for application in all United States courts, state and federal, there is already a determinative uniform rule in our jurisprudence – the Constitution of the United States and more pertinently, the Bill of Rights and the First Amendment. All state and federal courts are bound by its principles applicable to defamation law. Any American who has litigated a defamation lawsuit in a foreign country and lost (or defaulted, deliberately in Ms. Ehrenfeld's case) has the right at present to go to any court where recognition and enforcement of that foreign libel judgment is sought and oppose recognition or enforcement with arguments based on the First Amendment, basically built upon *New York Times v. Sullivan* and its progeny. Cases denying enforcement in such circumstances are already on the books, though many have not reached the highest courts in the States where enforcement proceedings were. By referencing them, I do not mean to suggest that those cases were correctly decided.

2. In New York, for instance, *Bachchan v. India Abroad*, 154 Misc.2d 228 (Sup. Ct. NY Co.1992), denied enforcement of a libel judgment obtained in a UK court against assets of the defendant in the US. In my opinion that decision (and several from other states) was incorrect because the court employed a comparative law test -- simply comparing the United States constitutional standards following *Sullivan* and its progeny to the UK's substantive and procedural rules for defamation cases. No attention was paid, as far as I can tell, to the extent and quality of the evidence introduced in the UK court in that trial -- so we will never know if the actual record in that case would have supported a judgment under the *Sullivan* standards and thus allowed enforcement if that evidence had been placed on the record in the New York court and evaluated by the judge hearing the enforcement issue.

3. HR-6146 does not apply solely to libel judgments obtained by non-residents of the foreign country (the "libel tourists") against the American writer or publisher, but applies to all libel judgments even those against non-Americans who have assets in the US.. Thus, an Englishman suing in his own court for defamation by an American writer or publisher who satisfies the court that it has jurisdiction over the American defendant based on publication or other activity in England, and who then finds he must come to America to collect his judgment, is equally barred as is the "libel tourist" as long as the basic test for non-recognition and non-enforcement is one of comparative law. I think I am reading HR-6146 correctly as also barring enforcement of that Englishman's English libel judgment against a fellow Englishman who has assets in the US needed to satisfy the judgment. Can that really be intended?

4. It is well known that no other country in the world has adopted the standards of proof in defamation cases derived from *Sullivan* and its progeny. As long as a "comparative law" test is employed by the courts -- as I believe would be the case under HR-6146 -- no litigant with a judgment from a court elsewhere in the world has even the remotest chance of gaining enforcement here in the United States. In effect, the Bill exports the First Amendment with any American's published material, giving it an extra-territorial effect.

5. HR-6146 will also set American courts to the task of determining what sorts of subjects are "matter[s] of public concern." In *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), Justice Thurgood Marshall, in dissent (403 U.S. at 79), suggested that courts and judges should

Honorable Steve Cohen, Chairman

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not be assigned the task of determining what is a matter of public interest or concern. His reasoning is just as cogent today as it was in 1971.

I believe that setting up such a complete barrier to enforcement of foreign libel judgments will do great harm to the concepts of reciprocity and mutual respect which underlie the principle of comity which is at the heart of international recognition of the judgments of other countries in the community of nations. Such "protective" legislation by the United States puts our country at risk of retaliatory measures by even friendly nations such as the UK, Canada, Ireland and Australia which have long been recognizing judgments obtained in our courts which required enforcement abroad.

The bills introduced in the Senate and the House in the previous Congress (S-2977 and HR-5814) have the same flaws and, tragically, in my view, go even further in presenting an amazing temptation for other nations to retaliate by purporting to authorize both damages actions and a treble damage action against foreign libel plaintiffs who seek to enforce their foreign court judgments in the United States. Just as, I think, New York's "Libel Tourism Protection Act" has not cured the problem of personal jurisdiction which doomed Rachel Ehrenfeld's declaratory judgment action in the federal courts here in New York City and the New York Court of Appeals, I believe that the direct relief in the form of damages proposed in Representative King's Bill (HR-5814) and that sponsored by Senators Lieberman and Specter (S-2977) will founder when presented in court on the constitutional due process issue inherent in their attempt to assert personal jurisdiction over foreign nationals who have no contact with the US other than the service of papers in the foreign libel action.

Before closing, I respectfully suggest that HR-6146 and its 111th Congress successor could, by a relatively simple amendment, provide the successful foreign libel judgment holder who brings it to America for enforcement a fair opportunity to obtain recognition and enforcement by making clear that the standard of "consistent with the first amendment to the Constitution of the United States" is not to be tested by a mere comparison of our country's constitutionalized defamation law to that of the foreign country, but by an examination of the evidentiary record of the foreign proceeding to determine whether the evidence underlying the judgment would satisfy the principles laid down by *New York Times v. Sullivan* and its progeny. Such a clear standard, it seems to me, would not cause the disruption noted above to international comity which is the foundation for reciprocal recognition and enforcement of judgments.

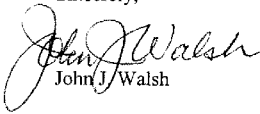
I respectfully request that this letter be made a part of the record of the February 12, 2009 hearing conducted by your Subcommittee. Since HR-6146 passed the House in the 110th Congress, I am not sure whether it will need to be reintroduced there, but if it is and there is to be a further hearing on the reintroduced Bill, I also request an opportunity to submit written testimony and to testify in person and be questioned about my views which are based on my 28 years of practice in the field of defamation law.

Honorable Steve Cohen, Chairman

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Thank you for your consideration.

Sincerely,

  
John J. Walsh

JJW:mc

cc: Matthew Wiener, Esq., Staff Counsel (by e-mail)



PREPARED STATEMENT OF THE ASSOCIATION OF AMERICAN PUBLISHERS

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**Statement of  
The Association of American Publishers  
to the  
Subcommittee on Commercial and Administrative Law  
of the  
Committee on the Judiciary  
U.S. House of Representatives  
February 12, 2009**

**Concerning Libel Tourism**

We are pleased to have the opportunity to submit this statement for the record on a subject of intense concern for the Association of American Publishers and its members: “libel tourism,” the cynical exploitation of plaintiff-friendly foreign libel laws as a weapon to intimidate and silence U.S. authors and publishers.

The Association of American Publishers (AAP) is the national trade association of the U.S. book publishing industry. AAP’s approximately 300 members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, post-secondary and professional markets, and computer software and electronic products and services. The Association represents an industry whose very existence depends upon the unfettered exercise of free-speech and free-press rights guaranteed by the First Amendment. Libel tourism is a direct threat to those First Amendment rights and an increasing concern for AAP and its members.

Typically, “libel tourists” use vast financial resources at their disposal to bring lawsuits overseas in order to punish and intimidate U.S.-based authors who write about sensitive but vitally important subjects such as the funding of terrorism. Even if they do not attempt to enforce the foreign libel judgment in the United States, the very existence of such judgments can silence the kind of reporting that our laws are designed to encourage and protect.

While several of the most recent high-profile examples of libel tourism involve judgments obtained in England by Saudis implicated in the funding of terrorism, the

threat is wider and more insidious. The sale of books over the Internet exposes U.S. authors and publishers to the danger of being sued almost anywhere in the world, and libel tourist litigation remains a threat in any country where our strong constitutional free speech protections are absent.

The threat posed by libel tourism has received increased attention as a result of the Rachel Ehrenfeld case. In 2004, soon after her book *Funding Evil: How Terrorism is Financed—And How to Stop It*, was published in the United States, Dr. Ehrenfeld, a New York-based author was sued for libel by Saudi billionaire banker Khalid bin Mahfouz in a London court under England's notoriously plaintiff-friendly libel laws. The fact that the book was never published in England and that a mere 23 copies were sold there via the Internet did not stop an English judge from issuing a default judgment against Dr. Ehrenfeld, awarding substantial monetary damages and costs, ordering a public apology, banning her book in England, and ordering the destruction of all unsold copies. Mr. bin Mahfouz has successfully sued or silenced some 40 authors and publishers and boasts of these "victories" on his web site. Dr. Ehrenfeld decided to fight back.

Instead of taking part in the English proceedings, Dr. Ehrenfeld counter-sued in federal court in New York seeking a declaration that the English judgment was unenforceable in the United States. A ruling by the New York Court of Appeals that New York's long-arm statute did not permit the exercise of personal jurisdiction over Mr. bin Mahfouz led to the dismissal of her suit but prompted swift action by the New York Legislature in passing the "Libel Terrorism Protection Act." Dubbed "Rachel's Law," it prohibits the enforcement of a foreign libel judgment unless a New York court determines that it does not violate the free-speech and free-press protections guaranteed by the First Amendment and the New York State Constitution, and it broadens the power of New York courts to exercise personal jurisdiction over non-residents who obtain foreign libel judgments against New Yorkers. It was signed into law by Governor Paterson on April 30, 2008. A similar law was enacted and signed into law in Illinois in August.

While passage of the New York and Illinois legislation was heartening, it underscored the need for a federal statute to address the problem of libel tourism on a nationwide basis. We are deeply grateful to the Chairman of this Subcommittee, Representative Cohen, for his leadership in introducing and shepherding through to House passage in the 110<sup>th</sup> Congress a bill to prohibit U.S. courts from recognizing a foreign defamation judgment "based upon a publication concerning a public figure or a matter of public concern" unless the court determines that the foreign judgment is consistent with the free-speech and free-press protections guaranteed by the First Amendment. We are equally grateful to Representative Peter King for introducing and championing legislation taking a more aggressive approach and allowing U.S. authors targeted by meritless foreign libel suits to counter-sue in U.S. courts. Our preferred legislation lies somewhere between these two proposals, and we hope that such a bill will emerge from these hearings.

The legislation introduced by Representative Cohen and passed by the House in the closing days of the 110<sup>th</sup> Congress is fine as far as it goes. AAP agrees on the importance of codifying the principle that foreign defamation judgments that fly in the face of

established First Amendment law are not enforceable in U.S. federal or state courts. This would send a clear message to those who would seek a foreign defamation judgment against a U.S. author or publisher without proving falsity or demonstrating actual malice. It would ensure that a U.S. court would engage in the appropriate comity analysis in any proceeding to enforce a foreign defamation judgment that could not have been obtained in a U.S. court.

But Representative Cohen's original bill does not go far enough. It merely formalizes a legal doctrine courts already apply. Under the doctrine of comity, countries generally recognize and enforce the legislative, executive, or judicial acts of other countries unless doing so would be contrary to their own laws or public policies. Comity is accorded by U.S. courts except where enforcement would be "repugnant to fundamental notions of what is decent and just" under U.S. law. Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981) (citing Hilton v. Guyot, 159 U.S. 113 (1895)).

Fundamental U.S. notions of justice obviously come into play in cases where the recognition or enforcement of foreign libel judgments would conflict with free-speech rights guaranteed by the First Amendment and state constitutions. In such cases, courts have held the judgments unenforceable because they were rendered without protections afforded to libel defendants by the First Amendment. In Bachchan v. India Abroad Publications, Inc., 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup. Ct. N.Y. Co. 1992), for example, the court refused to enforce an English libel judgment obtained without proof of falsity or the required degree of fault, and observed: "The protection to free speech and the press embodied in [the First 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."

The problem with going no further than codifying this comity analysis is that, while it would give some comfort to U.S. authors subject to foreign defamation judgments, it would, in many cases, leave them lacking the legal tools needed to maintain a declaratory judgment action aimed at defusing the threat of an enforcement proceeding. Such an unexecuted threat of enforcement – the proverbial Sword of Damocles – can inflict ongoing harm in the form of injury to reputation, impairment of credit rating, lost publishing opportunities, and speech chilled by fear of retribution. Without a basis for obtaining a judgment of unenforceability, a U.S. author may have no recourse against these harms. Dr. Ehrenfeld's case clearly demonstrates the problems inherent in this situation.

The bill passed by the House last September, H.R. 6146, stopped short of the laws enacted in New York and Illinois by failing to provide the basis for a declaratory judgment action such as the one initiated by Dr. Ehrenfeld. It is true that in states such as California, where the applicable long-arm statute already reaches to the limits of due process, a federal law may not be necessary to provide the ability to obtain personal jurisdiction over a foreign libel plaintiff. However, where the unfettered exercise of First Amendment rights on subjects of profound public concern such as the funding of terrorism is involved, it would be a mistake to stop short of providing strong and uniform

protection across the country. Adopting the approach taken in H.R. 6146 would represent a missed opportunity to ensure that U.S. authors and publishers across the country are able to initiate litigation to remove a foreign threat to the exercise of their First Amendment rights in the United States.

AAP views the approach taken in the Free Speech Protection Act (H.R. 5418), introduced last year by Representative King, as having both strengths and weaknesses. Legislation in this area, which touches upon international relations, norms of private international law, due process limits on the exercise of personal jurisdiction, and Article III limits on the jurisdiction of the federal courts, should be written to accomplish the goal of protecting freedom of speech within the limits imposed by these countervailing considerations. We believe several modifications to the approach taken in the Free Speech Protection Act are warranted.

Although AAP supports the goal of discouraging the filing of foreign defamation actions against U.S. speakers, we believe a foreign defamation judgment would need to be rendered before a declaratory judgment action could be undertaken. Allowing the mere filing of a foreign action to trigger a U.S. cause of action is not advisable since a U.S. court would in all probability lack Article III jurisdiction to determine the enforceability of a foreign defamation judgment that does not yet exist. Moreover, making the mere filing of a foreign defamation action unlawful risks sending a message of disrespect for differing foreign legal systems that AAP believes is not desirable.

Another concern arises from the constitutional “minimum contacts” limitation on the exercise of personal jurisdiction under the Due Process Clause. The approach taken in the Free Speech Protection Act would base the exercise of personal jurisdiction on nothing more than service in the United States of legal documents in connection with the foreign action. The splintered en banc ruling of the Court of Appeals for the Ninth Circuit in *Yahoo!, Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006), however, suggests that the service of process in the United States in connection with a foreign lawsuit would not be enough, by itself, to make the exercise of personal jurisdiction over the foreign plaintiff constitutional. AAP therefore suggests that the bill predicate the exercise of personal jurisdiction on the service of judicial documents in the United States and on the foreign defamation judgment requiring the U.S. person to take or cause to be taken speech-related action in the United States, such as issuing an apology or removing content from the Internet. These dual requirements would make the bill less vulnerable to constitutional objections.

The most aggressive feature of the Free Speech Protection Act is the provision authorizing an award of treble damages where it can be shown that the foreign plaintiff brought the defamation action as part of an intentional “scheme to suppress” the First Amendment rights of the U.S. speaker. In our view, an award of compensatory damages plus costs and attorney’s fees attributable to the foreign action will provide adequate recovery for the U.S. speaker and sufficient disincentive to potential libel tourists.

Beyond the fact that it may contribute little in the way of additional deterrence, the treble damage provision is problematic because under principles of private international law many foreign courts will not enforce U.S. punitive damage awards, just as U.S. courts do not enforce monetary fines or penalties awarded by foreign courts. (In the U.K., indeed, there is a statute barring enforcement of multiple-damage awards.). It would seem advisable and prudent not to respond legislatively to foreign judgments that are contrary to U.S. law and public policy with a treble damage provision that is contrary to public policy in many foreign jurisdictions. AAP believes the core objectives of the legislation – giving U.S. speakers the means to remove the cloud of a foreign defamation judgment and discouraging the filing of such actions in the first place – can be achieved without a treble damages provision that may well be unenforceable in the home country of the foreign defamation plaintiff.

AAP also is concerned that any legislation aimed at libel tourism must be directed toward true libel tourism. It should distinguish forum shopping aimed at silencing U.S. speakers from legitimate efforts to obtain redress for reputational injury where the speech in question, while originating in the United States, was intentionally distributed in or otherwise targeted at the foreign jurisdiction. Although a declaration of non-enforceability would be appropriate in either situation if the foreign judgment does not meet First Amendment standards, AAP recommends distinguishing between the two situations by allowing the recovery of damages only where the speech giving rise to the foreign action was not published in or otherwise targeted at the foreign jurisdiction.

The following is a summary of the preferred bill AAP would like to see speedily passed by the 111<sup>th</sup> Congress. We are grateful for this opportunity to express the views of the U.S. book publishing industry and urge Congress to act quickly on this issue.

#### **Summary of AAP Preferred Bill**

1. A cause of action may be brought in federal district court against a foreign defamation plaintiff by a U.S. person against whom a foreign defamation judgment has been rendered. Personal jurisdiction over the foreign defamation plaintiff is proper where (i) the foreign defamation plaintiff served or caused to be served legal documents in the United States in connection with the foreign action and (ii) the foreign judgment requires the U.S. person to take speech-related action in the United States.
2. An action may be brought in any district in which the U.S. person is domiciled or owns property that could be executed against to satisfy the foreign defamation judgment.
3. The district court shall award injunctive relief barring enforcement of the foreign defamation judgment in any state or federal court if that judgment was rendered under legal standards that violate accepted First Amendment jurisprudence.
4. The court may, in addition, award damages to the U.S. person based on (1) harm caused to the U.S. person as a result of the foreign action and (2) costs incurred by the

U.S. person attributable to the foreign action, provided the speech giving rise to the foreign action was not published in or otherwise targeted at the foreign jurisdiction.

PREPARED STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION (ACLU)



Written Statement of the  
American Civil Liberties Union

Caroline Fredrickson  
Director, Washington Legislative Office

Michael W. Macleod-Ball  
Chief Legislative and Policy Counsel

before the  
House Judiciary Committee  
Subcommittee on Commercial and Administrative Law

February 12, 2009

*Hearing on Libel Tourism*



**WASHINGTON LEGISLATIVE OFFICE**  
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 Caroline Fredrickson  
*Director*

**Written Statement of the  
 American Civil Liberties Union  
 Caroline Fredrickson  
 Director, Washington Legislative Office  
 Michael W. Macleod-Ball  
 Chief Legislative and Policy Counsel  
 before the  
 Subcommittee on Commercial and Administrative Law  
 February 12, 2009**

Chairman Cohen, Ranking Member Franks, 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.<sup>1</sup> 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 constitutional 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

<sup>1</sup> 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.



published statement, whereas in the U.S. the plaintiff must prove its falsity before 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.<sup>2</sup>

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 there by a Saudi businessman who claimed the book defamed him. Her testimony today before this committee will speak for itself. Suffice to say, however, that the businessman's connections to the U.K. and damages there were tenuous, that the U.K.'s libel standards are easier to meet, and that 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 110<sup>th</sup> 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. 2977 offered by Senator Specter and its companion, H.R. 5814, offered by Representative King, would have helped 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. After incorporating modifications to its original language in the Senate, the bill would have entitled U.S. speakers to seek a claim against foreign judgment holders if and when they attempted to serve court papers here. It would have only rendered the foreign judgment unenforceable if the foreign lawsuit did "not constitute defamation under United States law."<sup>3</sup>

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<sup>2</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>3</sup> The 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 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)

Chairman Cohen's bill offered in the 110<sup>th</sup> Congress, H.R. 6146, took a more defensive posture. Instead of providing the libel tourism victim a claim against the foreign plaintiff, it instead would have barred enforcement of such a judgment in the U.S. The bill had fewer questions surrounding its validity and would certainly have provided protection for the victim whose assets were in the U.S., thereby requiring the original plaintiff to come to courts here to enforce the judgment. On the other hand, the bill would have been less effective against American victims with assets overseas and would have done 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 which are far closer to international standards than those of Great Britain. In fact, in July 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.<sup>4</sup>

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 110<sup>th</sup> 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. We do believe that changes to the Specter/King bill as suggested by Senator Specter in the Senate Judiciary Committee last year improve that affirmative approach to the libel tourism issue. We also believe that Chairman Cohen's approach last year would be an effective solution for many Americans subject to libel tourism claims. 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. It helps the United

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<sup>4</sup> 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).

States to stand as a beacon for the preservation of individual free speech rights and encourages other nations to adopt similarly strong standards in line with agreed-upon international norms.

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@dcclu.org](mailto:mmacleod@dcclu.org).

Sincerely,



Caroline Fredrickson  
Director, Washington Legislative Office



Michael W. Macleod-Ball  
Chief Legislative and Policy Counsel

PREPARED STATEMENT OF THE AMERICAN JEWISH CONGRESS

TESTIMONY  
OF THE  
AMERICAN JEWISH CONGRESS  
ON THE SUBJECT OF  
LIBEL TOURISM  
BEFORE THE  
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW  
OF THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES HOUSE OF REPRESENTATIVES  
February 12, 2009

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TESTIMONY OF THE AMERICAN JEWISH CONGRESS  
 ON THE SUBJECT OF  
 LIBEL TOURISM  
 BEFORE THE  
 SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW  
 COMMITTEE ON THE JUDICIARY  
 UNITED STATES HOUSE OF REPRESENTATIVES  
 FEBRUARY 12, 2009

On behalf of the American Jewish Congress, we want to thank the Subcommittee for holding hearings on the subject of “libel tourism.” The American Jewish Congress believes that libel tourism is a real problem, one that needs to be addressed legislatively both in Congress and state legislatures. We have supported such efforts in Congress, and we are working with state legislatures around the country to thwart the excesses of libel tourism. Attached as appendices to this testimony are legal materials addressing libel tourism, and the domestic efforts to thwart it. Those materials describe our positions in greater depth.

Libel tourism, as this committee knows, is the phenomenon of citizens of one country, claiming to be defamed by citizens of another country, suing in yet a third country with no interest in the dispute other than, perhaps, the sale of a few isolated copies of the publication. In almost every such case, that third country’s libel laws are far friendlier to plaintiffs than United States law. Given its plaintiff-friendly libel laws, England is the forum of choice of libel tourists. *See Writ Large: Are English Courts Stifling Free Speech Around The World, Economist* (January 8, 2009).

We note, too, that, as laid out in Appendix A, although cast into prominence by a suit by a Saudi against an American author discussing that persons’ alleged role in financing terrorism, the phenomenon has now metastasized to include suits by an Israeli professor against a Palestinian-American professor for a hostile review of her book. The time to stop the phenomenon is now.

The vindication of reputation is an important governmental interest. It is an interest which must be balanced against the important governmental and social interest in freedom of speech. In the classical law of defamation, and still in England today, truth was and is central—defamatory statements that are true are not actionable. But as our Supreme Court recognized in *NY Times v. Sullivan*, 376 U.S. 254 (1964), freedom of speech needs breathing room, that trivial misstatements of fact must not give rise to outsized awards; freedom of speech must make room for honest errors, allow for the difficulties of proving truth, and the

possibility that, in many cases, truth is not readily, if at all, ascertainable. Thus, under our Constitution, unless a statement about a public figure or public controversy is made with deliberate disregard of its truth (“malice”), it is protected. In England, almost none of this is true.

American law has additionally accommodated free speech concerns by requiring plaintiffs to prove falsity, not defendants to prove truth. The difference is significant. In Great Britain, a Holocaust denier living in England (David Irving) suing an American critic (Professor Deborah Lipstadt) for her criticism of his views in a book published in the United States, did not have to prove that the Holocaust did not happen; rather Lipstadt, at considerable expense, had to prove that it did. In the United States, the Holocaust denier would have had the impossible burden of proving his historically untenable claims.

We think as a general matter the American rule is sounder than the English law. Nevertheless, we think it unwise for the United States to enact legislation to tell other countries how they balance the conflict between freedom of speech and protecting the interest in reputation in defamation cases involving torts committed in their borders, even where one of the defendants is an American citizen. We should, however, insist that our courts will not enforce foreign judgments that are in evident conflict with our national commitment to robust public debate, when those judgments are entered in cases in which those countries have no substantial interest. And, of course, we should not in any way interfere with the enforcement of defamation judgments entered in cases of deliberate lies, no matter what legal standards might apply.

While the full faith and credit clause requires one state to honor the judgments of another state, recognition of foreign judgments is a matter of international courtesy (comity) only, as the Supreme Court held in *Hilton v. Guyot*, 159 U.S. 113 (1895); Restatement of the Law (3d), Foreign Relations Law of the U.S., § 482(d). As we explain in detail in Appendices A and C, state and federal courts in their discretion need not enforce judgments which violate their fundamental public policies. The First Amendment is surely such an interest, and fully justifies a policy of non-enforcement of libel or defamation judgments inconsistent with it. Some courts have in fact refused such enforcement, again as laid out in the accompanying legal materials. Congress should go further. It must make non-enforcement mandatory, not discretionary, in libel tourism cases where the judgment flies in the face of our First Amendment.

Libel tourism is problematic for two reasons. First, it relies on quite dubious theories of jurisdiction over Americans for activity which takes place primarily in the United States, not in the forum state or the state of residence of the plaintiff. As we have noted, very different questions would be presented if an American made statements in a foreign country which were

actionable in that country. We take no firm position now on whether Congress ought to protect Americans against domestic enforcement of these judgments. There are substantial arguments on each side of that question, and while we now lean strongly in favor of non-enforcement, we cannot say that we have fully considered the problem.

Second, libel tourism is problematic because it so directly trenches on Americans' abilities to debate pressing issues in an informed fashion. The First Amendment is not only a statement of abstract principle—it is an indispensable means of ensuring that our democracy works. Those foreigners unhappy with our robust democracy should not be permitted to roam the world looking for a friendly venue from which to launch lawsuits intended to silence our national debates.

In considering these matters, this Committee should bear in mind some facts of the publishing world. Many books, especially books about public affairs are, at best, marginally profitable. Publishers have no financial incentive to defend libel cases in far away jurisdictions. In many cases, it even makes economic sense to default. Many publishers' contracts make authors responsible for costs of defending defamation suits, although these provisions are not always enforced. Authors of most public interest books cannot bear those expenses, making the libel suit a doubly effective weapon. Thus, even if the number of actual "libel tourism" cases is small, one needs to consider the possibility that these few cases have a chilling effect on what never gets published or what gets edited out because a publisher prefers to forgo a small profit (or a paragraph or two) rather than risk far larger legal costs.

The subcommittee has no bills currently pending to address these issues. During the last session of Congress two such bills were introduced—one by Representative Stephen Cohen (H.R. 6146) and one by Representative Peter King and Senator Arlen Specter (H.R. 5814/S.2997). Each of those bills had strengths and weaknesses. We supported both bills, although in each case with some reservations. The reasons for our support, and our reservations, are laid out in letters to the respective sponsors, and in an accompanying legal memorandum, which set out our views on the bills. We urge you to take these matters into consideration as you set out to draft legislation.

During the last session, some question was raised about Congress' power to address the issue of the enforcement of foreign judgments in state courts. For the reasons laid out in the memo accompanying our May 15, 2008 letter to Representative King, we believe those arguments are without merit. However, given the present uncertain state of the U.S. Supreme Court's federalism jurisprudence, we will continue to press for state legislation along the lines of legislation passed in New York and Illinois. Courts may already have discretion—but not the duty—to refuse to enforce libel tourism verdicts in those states that have adopted either the Uniform Foreign Money Judgments Recognition Act or the more recent Uniform Foreign

Country Money Judgments Recognition Act. (Some states have adopted neither.) We believe the problem of libel tourism sufficiently important as to merit special and targeted legislation, both at the federal and state level mandating non-enforcement.

We thank the Committee for its consideration of our views.



# APPENDICES

Appendix A .....	Questions and Answers on Libel Tourism
Appendix B .....	Letter to Governors in Support of Libel Tourism
Appendix C .....	Letter to Representative Stephen Cohen re H.R. 6146
Appendix D .....	Letter to Representative Peter King re H.R. 5814
Appendix E .....	Memorandum on Legal Issues Raised by H.R. 5814

APPENDIX A



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#### QUESTIONS AND ANSWERS ON LIBEL TOURISM

##### 1. What is libel tourism?

Libel tourism is the phenomenon whereby a resident of country A sues a resident of country B, who allegedly defamed the plaintiff in country B, in a court in a third country (C) because its law of defamation is more favorable to plaintiffs than the law of the country where the statement was made. Jurisdiction in country C is often based on the sale of a very few copies of the offending publication, often on the Internet. Typically, "libel tourism" plaintiffs bring suit in England where defamation law is much more favorable to plaintiffs than in the United States.

##### 2. Are there recent examples of libel tourism?

Yes. American author Rachel Ehrenfeld published a book in the United States accusing a prominent Saudi businessman Khalid bin Mahfouz of funding terrorism. Some 25 copies of this book were sold over the Internet in England.

Bin Mahfouz responded with a libel suit in Britain. Ehrenfeld's publisher refused to pay for a defense, and a default judgment was entered against her.<sup>1</sup>

In another case, an Israeli professor, Gannit Ankori, sued an American scholarly journal in English courts over an unfavorable review of her books by American professor, Joseph Massad. The journal settled rather than bear the legal expenses of a defense in England.

##### 3. What are the differences between American and English defamation law?

The main differences are: (1) in England, the person accused of defamation must prove his statements to be true; in the United States, the person claiming to be harmed must demonstrate that the statements were false;

(2) in the United States, a person is not liable for a false statement (at least in cases involving public figures or matters of public concern) unless the statements were made in reckless disregard of whether it was true ("malice"); in England, if the statements are false, it is irrelevant whether the person making the statements had made every possible effort to ascertain its truth.

##### 4. Are these judgments enforceable abroad?

If the publisher or author has assets in the country where the judgment is entered, those assets can be taken to satisfy the judgment. They can likewise be ordered (as has happened) to destroy or recall unsold copies. But if the author or publisher has no assets in the country of judgment, the plaintiff must pursue the author in his or her home country.

<sup>1</sup> See *Ehrenfeld v. bin Mahfouz*, 9 N.Y.3d 501 (2008). See also, *Ehrenfeld v. bin Mahfouz*, 418 F.3d 102 (2d Cir. 2008).

**5. Are such judgments enforceable in the United States?**

States must enforce (give full faith and credit to) the judgments of the courts of other states.

The judgments of foreign courts are enforceable only as a matter of international courtesy (comity). It is well settled that foreign judgments need not be enforced if they violate important public policies.<sup>2</sup> The few courts that have reached the question have indicated that they will not enforce foreign defamation judgments which could not be entered in the United States because of our nation's fundamental commitment to freedom of speech.<sup>3</sup> However, most states have not yet decided the question, leaving defendants either vulnerable to the enforcement of the suspect foreign judgment, or saddling them with the burden of litigating to establish that the foreign judgment is unenforceable. And the latter is not easy.

**6. What difficulties are there in establishing that a judgment is unenforceable?**

Most importantly, the Due Process Clause of the United States Constitution allows lawsuits only against persons with sufficient contacts with a state to make it fair to ask that person to defend himself there. In the libel tourism context, the libel plaintiff often has no such relevant contacts. Even aside from constitutional concerns, state jurisdictional statutes (so called long-arm statutes) do not always allow courts to exercise jurisdiction over people who have never entered the jurisdiction or done business there. In fact, on these grounds, the New York courts refused to hear a suit brought by Ms. Ehrenfeld against Mr. bin Mahfouz to prevent enforcement of his judgment against her.<sup>4</sup>

**7. Has there been any legislative action to deal with libel tourism?**

Yes. Subsequent to the decision in the Ehrenfeld case discussed in the previous question, New York State enacted legislation (a) declaring defamation verdicts in libel tourism cases unenforceable in the state; and (b) amending the state's jurisdictional statute to allow for suits to prevent enforcement of foreign libel tourism verdicts.<sup>5</sup>

Two bills (H.R. 5814/S. 2997 and H.R. 6146) were introduced in the U.S. Congress to deal with the problem. H.R. 6146 passed the House at the end of September and is awaiting Senate action. Although they differ in detail (some of them important) both bills would bar enforcement of libel tourism judgments.

<sup>2</sup> *Hilton v. Guyot*, 159 U.S. 113 (1895); *Restatement of the Law* (3d): *The Foreign Relations of the United States* § 482(d).

<sup>3</sup> *Sarl Louis Feraud v. Viewfinder*, 489 F.3d 474 (2d Cir. 2007) (collecting cases); *Telnikoff v. Matusevitch*, 347 Md. 561, 702 A.2d 230 (Ct. App. Md. 1997). *Cf. Aleem v. Aleem*, 2008 W.L. 1945345 (Ct. App. Md. 2008) (unequal treatment of women in divorce precludes enforcement of Pakistani Islamic divorce); *Cf. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199 (9<sup>th</sup> Cir. 2006) (*en banc*) (concurring opinion).

<sup>4</sup> See footnote 1, *supra*.

<sup>5</sup> NY C.P.L.R. §§ 302 and 5304 (2008).

**8. Do United States courts or states have any business telling foreign nations how to enforce the law of defamation?**

Nothing in the effort to stop libel tourism tells foreign courts how they should apply the law of defamation. They may do so as they please. AJCongress is not urging any effort to stop foreign courts from deciding defamation cases in which Americans are defendants. (The legislation would also not prevent enforcement of judgments in cases of deliberate defamatory lies.) It is one thing, though, to allow those courts to apply their own law; it is another to insist that American courts lend assistance to judgments that violate our nation's fundamental public policies. Other nations have no right to compel them to do so.

**9. What has been the response to the effort to stop American courts from enforcing libel tourism judgments?**

Editorials and op-ed pieces in papers as diverse as the NEW YORK TIMES, WALL STREET JOURNAL, the (Manchester) GUARDIAN and the DELAWARE NEWS have all urged support for anti-libel tourism legislation. A selection of articles is attached.

**APPENDIX B**

July 23, 2008

[Addressee]

Dear Governor:

I am writing on behalf of the American Jewish Congress to call your attention to an emerging threat to American freedom of expression, this one from abroad, so-called libel tourism. We urge your support for proposed legislation to diffuse this threat and to ensure that foreign judgments that violate important public policies in favor of freedom of speech are uncollectible in your state. Ours is a nationwide effort, and we are approaching the Governors of each state, but we will achieve our goal only with the participation of every state.

I.

The American law of defamation affords substantial protection to those who address matters of public concern. Abroad, the law is often quite different, being tilted in favor of protecting reputation.

American authors whose works are published in the United States, but which make their way overseas—a common occurrence in this age of Amazon.com and BN.com—increasingly find themselves defending foreign defamation suits. Plaintiffs are seeking out defamation friendly locales for bringing suit, even though they have no substantial nexus to these places—chiefly the United Kingdom—hence the term ‘libel tourism.’ The expense of such an overseas defense, coupled with the adverse

substantive law, makes such suits prohibitively expensive to defend. Most authors and publishers simply default and if they have no foreign assets, hope that plaintiffs will not seek to enforce their judgments in the U.S.

Three recent cases illustrate these trends. The first was brought in England by the notorious Holocaust denier David Irving against Penguin Books and Deborah Lipstadt for a book published here. That suit (in which, under British law, Lipstadt had to prove in the courtroom that the Holocaust really occurred!) cost at least 3 million dollars to defend and would have been beyond Lipstadt's ability to defend but for generous contributions of funds by supporters and the services of one of England's best litigators.

More recently, American author Rachel Ehrenfeld published a book in the United States naming Saudi businessman Khalid bin Mahfouz as a financial supporter of terrorism. Some two dozen copies were sold via the internet in England. Mr. bin Mahfouz, a citizen and resident of Saudi Arabia, claimed defamation. He did not sue in the United States where the book was published and Ehrenfeld lives, or even in Saudi Arabia where he was domiciled, but in England, exploiting its pro-plaintiff libel law.

Ehrenfeld could not afford to defend a suit abroad; her publisher had no incentive to do so because the book in question had not generated sufficient sales to justify the expense. After suffering a default judgment in England, she brought suit in the courts of New York, seeking an order declaring the judgment unenforceable. The New York Court of Appeals<sup>1</sup> held the suit could not be maintained because the

<sup>1</sup> 9 NY3 501 (2007). See also *Ehrenfeld v. bin Mahfouz*, 418 F.3d 102 (2d Cir. 2008).



state's long-arm statute did not create jurisdiction over a person holding a foreign judgment which she had not sought to enforce in the state. The New York State legislature quietly amended the statutes to address the lacunae identified by the Court of Appeals.

More recently, the scholarly journal Art Journal settled a lawsuit by Israeli Professor Gannit Ankori, against Columbia University Associate Professor Joseph A. Massad, in regard to his critical review of a book by Ankori. The journal was published in the U.S.; the review was no nastier than the average hostile academic review. Ankori neither wrote a response nor sued where the journal was published. Instead, she followed in the footsteps of David Irving and Khalid bin Mahfouz and sued Professor Massad in the British courts. The academic journal settled the suit, asserting it could not afford to defend itself in a foreign forum.

American cannot, and should not, lightly interfere with the domestic law of foreign nations. But in the case of libel tourism, foreign law applied to actions of American citizens in the U.S. interferes not merely with the individual actions of American citizens having a substantial impact abroad, but with a fundamental American public policy that the marketplace of ideas should be vigorous and contested, and that the law of defamation must reflect that most fundamental of national commitments.

The attached draft statute addresses these problems. It follows well settled legal principles allowing states to refuse to recognize foreign judgment violations of public policy.

International judgments are enforceable not as of right, but only as a matter of international comity. *Hilton v. Guyot*, 159 U.S. 113 (1895). Restatement of the Law (3d): The Foreign Relations Law of the United States § 482(d). Among the factors to be considered in a nation's determining whether to enforce a foreign judgment is whether that judgment is "contrary to the policy of its own law," *id.* Even before the recent amendment to its law, New York's civil practice code, § 5304, for example, allowed for non-enforcement of judgments "repugnant to the public policy of this state." Surely, few concepts are more basic to the "policy of its own laws" than the free speech guarantees of the First Amendment.

Although the matter has apparently arisen only a few times, courts have not hesitated to refuse enforcement of judgments that impinge on that freedom. *Sarl Louis Feraud v. Viewfinder*, 489 F.3d 474 (2d Cir. 2007) (collecting cases); *Telnikoff v. Matusевич*, 347 Md. 561, 702 A.2d 230 (Ct. App. Md. 1997). *Cf. Aleem v. Aleem*, 2008 W.L. 1945345 (Ct. App. Md. 2008) (unequal treatment of women in divorce precludes enforcement of Pakistani Islamic divorce); *Cf. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (*en banc*) (concurring opinion).

Our proposed legislation would simply make concrete and simple what would probably occur in any event, but only after substantial and expensive, litigation. It declares in advance that defamation judgments which would violate the First Amendment are unenforceable, that comity does not extend to judgments that are repugnant to our values.

Our draft bill does not permit the denial of enforcement of any defamation judgment entered under a system of laws applying standards other than those required by the First Amendment. Instead, the bill denies enforceability of judgments which on their particular and peculiar facts would interfere with freedom of speech. It would properly allow a U.S. court to enforce a judgment resting on findings that a defendant deliberately and knowingly slandered the plaintiff ("actual malice"), even if the governing law did not adopt *in toto* the standards of *New York Times v. Sullivan* and its progeny. Enjoining enforcement of such a judgment seems to us to unnecessarily trammel on the legislative and judicial authority of other nations to define their own law of defamation, and not necessary to protect core First Amendment values.

If American courts find it unnecessary to afford deliberate falsehoods constitutional protection, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984), citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), we see no reason why a foreign judgment vindicating the victims of deliberate falsehoods should not be enforced domestically. That is so even if the larger legal framework would allow defamation judgments to be entered in cases that would offend our fundamental policies of freedom of speech.

We know that there will be many who will criticize our proposed legislation as American legal imperialism, an attempt to impose our laws on the entire world. They are wrong. The bill only prevents our courts from being enlisted in efforts to broadly suppress speech.

I enclose a draft statute, a legal memorandum, and a selection of clippings relating to the problem of libel tourism.

We would welcome an opportunity to discuss the bill, and other threats to freedom of expression emanating from foreign sources, with you and your staff.

Sincerely,

Richard Gordon  
President

*/drs*

APPENDIX C



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Tel. 212 369-1945 • Fax 212-758-1633 • [msrcm@ajcongress.org](mailto:msrcm@ajcongress.org)

Office of the General Counsel & Assistant Executive Director

May 29, 2008

Honorable Stephen L. Cohen  
United States Representative  
United States House of Representatives  
1004 Longworth House Office Building  
Washington, DC 20515

Attention: James Park, Staff Aid

[james.park@mail.house.gov](mailto:james.park@mail.house.gov)

Re: H.R. 6146 - FREE SPEECH PROTECTION ACT

Dear Representative Cohen,

I am writing on behalf of the American Jewish Congress to thank you for introducing H.R. 6146 to address the problem of libel tourism, and to endorse that legislation.

We believe that the Act's central provision—declaring that all American courts must refuse enforcement of any foreign defamation judgment as necessary to protect the right to free speech—is essential to preserving that right from judgments entered in countries whose defamation laws slight the importance of freedom of expression. The authority created by the bill would redress the problem of “libel tourism,” which both the U.S. Court of Appeals, *Ehrenfeld v. bin Mafouz*, 418 F.3d 102 (2d Cir. 2008) and the New York Court of Appeals, 9 N.Y.3d 501 (2007), left unsolved in the case of Dr. Rachel Ehrenfeld, who has published widely about the financing of terrorism.

Ehrenfeld was sued in England, notorious for its plaintiff-friendly libel laws, for identifying a wealthy Saudi citizen as a major funder of terrorism. A default judgment was entered there against her. (Publishers have little financial incentive to bear the burden of defending foreign defamation actions for books with limited markets. Publishing contracts typically require authors to bear the costs of defending such suits.)

When H.R. 6146 is enacted into law, writers in Ehrenfeld's position, and their publishers, will rest more soundly, knowing that judgments entered in foreign courts which flout the fundamental American freedom of freedom of speech and the press will be unenforceable everywhere in this country. Citizens, too, will be more secure, knowing that the American market place of ideas, including discussions of terrorism, will not be distorted or constricted by wealthy foreigners using foreign courts under laws alien to our nation's fundamental values.

Thus, even though the New York legislature acted quickly to fill the statutory gap identified by the New York court in *Ehrenfeld*, see NYCPLR §§ 302, 5304 (2008), nothing in that legislation prevents the plaintiff in her case from seeking to enforce his English judgment in the courts of New Jersey, Alaska or Montana. Indeed, even in

Stephen I. Cohen  
May 29, 2008

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states that recognize a First Amendment public policy exception to the enforcement of foreign defamation judgments, a wealthy plaintiff could impose a substantial litigation burden on a writer or publisher, forcing him or her to defend against entry of a foreign judgment in multiple states. By creating a uniform standard for deciding questions of enforcement of foreign defamation judgments, H.R. 6146 would preclude such tactics.

H.R. 6146 builds on well-settled principles of international law and American jurisprudence to provide security for American writers and for the American marketplace of ideas.

International judgments are enforceable not as of right, but only as a matter of international comity. *Hilton v. Guyot*, 159 U.S. 113 (1895); Restatement of the Law (3d); The Foreign Relations Law of the United States, § 482(2)(d). Among the factors to be considered in a nation's determining whether to enforce a foreign judgment is whether that judgment is "contrary to the policy of its own law," *id.* Even before the recent amendment to its law, New York's civil practice code, § 5304, for example, allowed for non-enforcement of judgments "repugnant to the public policy of this state." Surely, few concepts are more basic to the "policy of its own laws" than the free speech guarantees of the First Amendment.

Although the matter has apparently arisen only a few times, courts have not hesitated to refuse enforcement of judgments that impinge on that freedom. *Sarl Louis Feraud v. Viewfinder*, 489 F.3d 474 (2d Cir. 2007) (collecting cases); *Telnikoff v. Matusevitch*, 347 Md. 561, 702 A.2d 230 (Ct. App. Md. 1997). *Cf. Aleem v. Aleem*, 2008 W.L. 1945345 (Ct. App. Md. 2008) (unequal treatment of women in divorce precludes enforcement of Pakistani Islamic divorce); *Cf. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199 (9<sup>th</sup> Cir. 2006) (*en banc*) (concurring opinion).

H.R. 6146, then, simply makes concrete and simple what would probably occur in any event, but only after substantial and expensive, litigation. It declares in advance that defamation judgments which violate the First Amendment are unenforceable, that comity does not extend to judgments repugnant to our core values.

Although it somewhat narrows the scope of the protection of the bill, we think it particularly prudent that the bill does not permit the denial of enforcement of any defamation judgment entered under a system of laws applying standards other than those required by the First Amendment. Instead, the bill denies enforceability of judgments which on their particular and peculiar facts would interfere with freedom of speech. The former formulation focuses on the law, not the facts of specific cases. H.R. 6146 would properly not allow a U.S. court to enjoin enforcement of a judgment resting on findings that a defendant deliberately and knowingly slandered the plaintiff ("actual malice"), if the governing law did not adopt *in toto* the *New York Times v. Sullivan* (and its progeny) standard. Enjoining enforcement of such a

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May 29, 2008

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judgment seems to us to unnecessarily trammel on the legislative and judicial authority of other nations to define their own law of defamation, and not necessary to protect core First Amendment values.

If American courts find it unnecessary to afford deliberate falsehoods constitutional protection, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984), citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), we see no reason why a foreign judgment vindicating the victims of deliberate falsehoods should not be enforced domestically. That is so even if the larger legal framework would allow defamation judgments to be entered in cases that would offend our fundamental policies of freedom of speech.

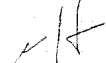
Our strong and enthusiastic support for the central proposition embodied in H.R. 6146 is premised on the unremarkable proposition that Americans should be free to publish in the United States without being held liable by hostile foreign courts with the most tangential contact with the speech or the plaintiff.

We know that there will be many who will criticize H.R. 6146 as American legal imperialism, an attempt to impose our laws on the entire world. They are wrong. The bill only prevents our courts from being enlisted in efforts to suppress speech. Nevertheless, we are concerned to draft a bill that will be as iron-clad as possible.

As you may know, we have also endorsed a companion bill (H.R. 5814) introduced by Representative Peter King. We recognize that there are differences between the two bills, but in our view those differences are easily bridgeable. It is our hope that the sponsors of the two bills can reach agreement on a common approach, so that the problem of libel tourism can be addressed. If we can be of assistance in that regard, we would be pleased to help forge a common bill.

We would welcome an opportunity to discuss the bill, and other threats to freedom of expression emanating from foreign sources, with you and your staff.

Sincerely,



Marc D. Stern

/dms

AJCongress



**APPENDIX D**



825 Third Avenue, Suite 1800 - New York, NY 10022-7519  
Tel. 212 960-1545 - Fax 212-738-1633 - [info@ajcongress.org](mailto:info@ajcongress.org)

Office of the General Counsel & Assistant Executive Director

May 15, 2008

*By mail & e-mail*

Honorable Peter King  
United States Representative  
United States House of Representatives  
Washington, DC 20535

Attention: Adam Paulson, Esq.

[adam.paulson@mail.house.gov](mailto:adam.paulson@mail.house.gov)

Re: H.R. 5814 - FREE SPEECH PROTECTION ACT

Dear Representative King,

I am writing on behalf of the American Jewish Congress to thank you for introducing H.R. 5814, the Free Speech Protection Act and to endorse that legislation. We also take this opportunity to raise several questions about the bill, questions which we raise to forestall later opposition. Those questions are discussed in the attached memo.

We believe that the Act's central provision--declaring that the federal courts may enjoin enforcement of any foreign defamation judgment where "appropriate to protect the right to free speech" is essential to preserving that right from judgments entered in countries whose defamation laws slight the importance of freedom of expression. The authority created by the bill would redress the problem of "libel tourism," which both the U.S. Court of Appeals, *Ehrenfeld v. bin Mafouz*, 418 F.3d 102 (2d Cir. 2008) and the New York Court of Appeals, 9 N.Y.3d 501 (2007), left unsolved in the case of Dr. Rachel Ehrenfeld, who has published widely about the financing of terrorism. She was sued in England, notorious for its plaintiff-friendly libel laws, for identifying a wealthy Saudi citizen as a major funder of terrorism. A default judgment was entered there against her. (Publishers have little financial incentive to bear the burden of defending foreign defamation actions for books with limited markets. Publishing contracts typically require authors to bear the costs of defending such suits.)

When H.R. 5814 is enacted into law, writers in Ehrenfeld's position, and their publishers, will rest more soundly, knowing that judgments entered in foreign courts which flout the fundamental American freedom of freedom of speech and the press will be unenforceable everywhere in this country. Citizens, too, will be more secure, knowing that the American market place of ideas, including discussions of terrorism, will not be distorted or constricted by wealthy foreigners using foreign courts under laws alien to our nation's fundamental values.

Thus, even though the New York legislature acted quickly to fill the statutory gap identified by the New York court in *Ehrenfeld*, see NYCP.L.R. §§ 302, 5304 (2008), nothing in that legislation prevents the plaintiff in her case from seeking to enforce his English judgment in the courts of New Jersey, Alaska or Montana. Indeed, even in states that recognize a First Amendment public policy exception to the enforcement of foreign defamation judgments, a wealthy plaintiff could impose a substantial litigation burden on a writer, forcing him or her to defend against entry of a foreign judgment in multiple states. By creating a uniform (and we assume) preemptive standard for considering questions of enforcement of foreign defamation judgment, H.R. 5814 would preclude such tactics.

We agree with the findings of facts recited in Section 2 of H.R. 5814 that the existing state of affairs threatens not only the freedom and pocketbooks of citizens, but the availability of information to policymakers who rely on writers for “information, ideas and opinions.”

H.R. 5814 builds on well-settled principles of international law and American jurisprudence to provide security for American writers and for the American marketplace of ideas.

International judgments are enforceable not as of right, but only as a matter of international comity. *Hilton v. Guyot*, 159 U.S. 113 (1895). Among the factors to be considered in a nation's determining whether to enforce a foreign judgment is whether that judgment is “contrary to the policy of its own law,” *id.* Even before the recent amendment to its law, New York's civil practice code, § 5304, for example, allowed for non-enforcement of judgments “repugnant to the public policy of this state.” Surely, few concepts are more basic to the “policy of its own laws” than the free speech guarantees of the First Amendment.

Although the matter has apparently arisen only a few times, courts have not hesitated to refuse enforcement of judgments that impinge on that freedom. *Sarl Louis Feraud v. Viewfinder*, 489 F.3d 474 (2d Cir. 2007) (collecting cases); *Telnikoff v. Matusevitch*, 347 Md. 561, 702 A.2d 230 (Ct. App. Md. 1997). *Cf. Aleem v. Aleem*, 2008 W.L. 1945345 (Ct. App. Md. 2008) (unequal treatment of women in divorce precludes enforcement of Pakistani Islamic divorce); *Cf. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (*en banc*) (concurring opinion).

H.R. 5814, then, simply makes concrete and simple what would probably occur in any event, but only after substantial and expensive, litigation. It declares in advance that defamation judgments which would violate the First Amendment are unenforceable, that comity does not extend to judgments that are repugnant to our values.

Although it somewhat narrows the scope of the protection of the bill, we think it particularly prudent that the bill does not permit the denial of enforcement of any defamation judgment entered under a system of laws applying standards other than those required by the First Amendment. Instead, the bill denies enforceability of judgments which on their particular and peculiar facts would interfere with freedom of speech. The former formulation focuses on the law, not the facts of specific cases. H.R. 5814 would properly not allow a U.S. court to enjoin enforcement of a judgment resting on findings that a defendant deliberately and knowingly slandered the plaintiff (“actual malice”), if the governing law did

not adopt *in toto* the *New York Times v. Sullivan* (and its progeny) standard. Enjoining enforcement of such a judgment seems to us to unnecessarily trammel on the legislative and judicial authority of other nations to define their own law of defamation, and not necessary to protect core First Amendment values.

If American courts find it unnecessary to afford deliberate falsehoods constitutional protection, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984), citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), we see no reason why a foreign judgment vindicating the victims of deliberate falsehoods should not be enforced domestically. That is so even if the larger legal framework would allow defamation judgments to be entered in cases that would offend our fundamental policies of freedom of speech.

The list of questions in the attached memorandum should not obscure our strong and enthusiastic support for the central proposition embodied in H.R. 5814—that American citizens and American publishers should be free to publish in the United States without being held liable by hostile foreign courts with the most tangential contact with the speech or the plaintiff.

We know that there will be many who will criticize H.R. 5814 as American legal imperialism, an attempt to impose our laws on the entire world. They are wrong. The bill only prevents our courts from being enlisted in efforts to suppress speech. Nevertheless, we are concerned to draft a bill that will be as iron-clad as possible.

We would welcome an opportunity to discuss the bill, and other threats to freedom of expression emanating from foreign sources, with you and your staff.

Sincerely,



Marc D. Stern

/dms

APPENDIX E



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## Memorandum of Law

**Date:** May 15, 2008  
**To:** Honorable Peter King  
United States House of Representatives  
**From:** Marc D. Stern  
**Re:** H.R. 5814 – THE FREE SPEECH PROTECTION ACT

Having endorsed H.R. 5814 in the attached letter, and without wavering in our support for the indispensable central pillar of the legislation, we would note the following questions about the bill. These are preliminary thoughts, and not necessarily our last thoughts on the subject. They are, again, not meant to indicate any lack of support for the bill. We are certain you and your staff have considered all of them. We raise them only because some were raised in connection with the New York law mentioned above by a distinguished group of lawyers, and others are certain to be raised.

Section 3(b) allows for jurisdiction over a foreign defamation plaintiff if suit is filed against a United States person or a United States person who has assets in the United States against which a judgment could be executed. In its current form, jurisdiction would exist as soon as an action has been filed in a foreign court. There need be no final judgment entered against the United States person, a point made explicit by § 3(b)(1). A U.S. person is defined in Section 6(5) of the bill to mean any American citizen, or, *inter alia*, a business entity lawfully doing business in the United States.

Nothing in the Act limits the cause of action created by Section 3 to speech published in the United States. It is entirely possible under the bill as it is currently drafted to be invoked by an expatriate American citizen publishing a book with a foreign publisher, or by a foreign citizen publishing a book with an overseas publisher which also does business in the United States, even if it is not incorporated in this country.

Likewise, nothing in the Act limits the possible defendants to those with any current or past substantial contact with the United States, or to those who have taken some steps, or announced an intention, to enforce a judgment in the United States.

All this raises several questions:

- (1) Would an action brought to enjoin enforcement of a yet-to-be-entered foreign judgment meet the case or controversy requirement of Article III? Such concerns motivated the district court in *Dow Jones v. Harrods*, 237 F.Supp. 394 (S.D. N.Y. 2002) to find a want of a case or controversy in an action filed to seek a declaratory judgment that if a judgment were entered in a pending foreign libel suit, it would be unenforceable here. The court found the action not in form a "case or controversy" within the meaning of Article III. Moreover, even in statutory terms, how could a

court accurately determine if enforcement of a right-to-be-entered-judgment on facts as yet unknown would violate First Amendment standards? This may be possible in some cases based on the pleadings, but surely not all.

- (2) The due process clause of the Fifth and Fourteenth Amendment requires “minimum contacts” with the forum for an exercise of jurisdiction over defendants not resident in the jurisdiction. The bill in current form does not appear to require that the defendants have any contact with the forum state or the United States. It is hard to see how it can be reconciled with due process requirements. *See Keeton v. Hustler Magazine, supra; Shaffer v. Heitner*, 433 U.S. 186 (1977). These issues were canvassed extensively by a badly divided Ninth Circuit in *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1194 (9<sup>th</sup> Cir. 2006), a case seeking to prevent U.S. enforcement of a French judgment banning sale on a website of Nazi memorabilia. While a plurality did find sufficient contacts on the facts there, the case is readily distinguishable. There the foreign judgment directed specific actions in the United States which might have suppressed speech here. How, then, can a court consistently exercise jurisdiction over a non-present defendant?

International criminal law recognizes a head of jurisdiction known as “passive personality,” that is, the right of a nation to exercise jurisdiction over crimes committed against its citizens overseas. Perhaps this theory could be extended to the civil realm, and to reach not only subject matter jurisdiction, but personal jurisdiction as well. This, however, requires further research and thought.

- (3) The case of the expatriate writer publishing abroad is particularly troubling. As it is, even in a case like *Ehrenfeld*, H.R. 5814 already impinges on the ability of foreign nations to enforce their own balance between freedom and protection of reputation. That is a cost worth bearing when the author is living and working in the U.S. and/or the speech is published in the United States. But where the speech of an expatriated U.S. citizen is published abroad, it may be entirely too bold a step to prohibit foreign nations from enforcing their own laws against torts committed within their borders.

Such an intrusion into foreign states regulation of their own citizens’ activity in their home country virtually invites “bite-back”—say, provisions trebling damages of any foreign defendant who invokes the treble damage provisions of H.R. 5814.

- (4) Congress’ power extends only to those matters enumerated in the Constitution. The Act does not spell out on which enumerated power it relies to have a federal court declare that no court may enforce a foreign judgment. In an age in which federalism and separation of powers concerns are prominent in constitutional litigation, attention must be paid to this question. With regard to judgments to be entered in federal courts, that should not be a problem under Congress’ Article III power to regulate the federal courts. What of state courts? On its face, the full faith and credit clause does not apply to foreign judgments (*Guyot, supra*). The Full Faith and Credit

Clause also does not plainly grant Congress powers to decide which judgments should be enforced.

However, in their authoritative treatise, The Constitution of the United States of America: Analysis and Interpretation (2004), J. Killian, G. Costello and Kenneth Thomas suggest (at 906) that “Doubtless Congress, by virtue of its powers in the field of foreign relations, might also lay down a mandatory rule regarding recognition of foreign judgments in every court of the United States.” If H.R. 5814 is an exercise of the foreign office power, it presumably trumps any contrary state laws.

Moreover, even as to legislating against the states, Congress might be thought to be exercising its commerce power to protect both the publishing industry generally, and particularly internet sales, sales that generated the *Ehrenfeld* case. Although not mandatory, findings of fact with regard to the impact on commerce of foreign defendant judgments would be helpful. A committee would hear from those in publishing and book sales to describe the impact foreign judgments have on their decision whether to publish, and if so, where to sell, books that might give rise to foreign libel suits, and make appropriate findings.

Alternately, Congress might be acting pursuant to Section 5 of the Fourteenth Amendment to enforce the guarantees of the First, that is, to prevent state courts from enforcing foreign judgments when the domestic enforcement has the effect of impinging free speech. To be a valid exercise of that power, legislation needs to be “congruent and proportional to the constitutional violation,” *City of Boerne v. Flores*, 521 U.S. 507 (1997). See, more recently, *Cutler v. Wilkinson*, 544 U.S. 709 (2005); *Tennessee v. Lane*, 541 U.S. 509 (2004). At first glance, the non-enforcement provision (Section 3) would appear to meet this test, but that the matter needs further thought and consideration because no court has yet held that enforcement of a foreign damage award would be a full fledged First Amendment violation, as opposed to merely being inconsistent with public policy. See *Tanikoff, supra*; *Yahool, supra*. Of course, a First Amendment argument is easily made, *Shelley v. Kraemer*, 334 U.S. 1 (1948), but that is different than saying that it is settled law.

- (5) We are particularly troubled by Section 3(d), which allows for treble damages if an American court determines that the purpose of a foreign suit was to “suppress First Amendment rights or discourage the employment or publication” by a particular writer.

Treble damages are a penalty, a quasi-criminal sanction. Section 3(d) mulcts foreign plaintiffs who, under the law of the forum state, act perfectly legally in invoking the laws of that forum to suppress defamatory speech. That is the entire purpose of defamation law. Only the most drastic circumstances should call for an American legislature to penalize recourse of foreigners to a foreign tribunal. It is quite a leap from protecting American speakers in the U.S. from foreign penalties to the proposition that the U.S. should fine foreigners who invoke foreign law against



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 U.S. House of Representatives  
 Re: H.R. 5814 – THE FREE SPEECH PROTECTION ACT

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speech published abroad because that law does not accord with our view of how to protect reputation. *NY Times v. Sullivan* is not, after all, the only possible balance between liberty and reputation.

One possible way of addressing this would be to limit the availability of treble damages to evident cases of forum shopping, as apparently occurred in *Ehrenfeld*, or to persons on official terrorism lists, and perhaps a few other tightly limited categories.

/drs

RESPONSE TO POST-HEARING QUESTIONS FROM BRUCE D. BROWN, ESQ.,  
BAKER AND HOSTETLER, LLP

**Responses of Bruce D. Brown, Esq.  
Baker & Hostetler LLP to  
Questions for the Record  
Subcommittee on Commercial and Administrative Law  
Hearing on Libel Tourism  
Thursday, February 12, 2009**

**Questions from the Honorable Steve Cohen, Chairman and the Honorable Trent Franks, Ranking Member:**

**1. You note in your written statement (p. 4) that “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 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.” On what do you base this assertion? What test of personal jurisdiction do English courts apply in defamation cases? How do they apply that test in the context of allegedly defamatory statements appearing on the Internet?**

I based my statement on page four primarily on the Supreme Court’s decision in Calder v. Jones, 465 U.S. 783 (1984). Calder, a libel case brought by a California actress, held that the California courts had personal jurisdiction over two Florida-based defendants (a reporter and an editor) because their actions in publishing an article about the celebrity “were expressly aimed at California.” Id. at 789. The “express aiming” test was satisfied because California was the “focal point both of the story and of the harm suffered.” Id. California was also the state where the publication at issue had its greatest circulation (600,000 copies).

Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002), is the logical extension of the Calder rule into the world of the Internet. In Young, a case that has been widely followed in the federal courts, the Fourth Circuit held that constitutional due process would be offended by permitting a suit against a publisher to go forward in a state simply because its website is viewable in that jurisdiction. Under Young, online publication is simply not enough. There must be some “express aiming” by the publisher into the jurisdiction in question, either over the Internet or otherwise.

Under English law, on the other hand, jurisdiction may be invoked against a foreign defendant any time “the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction.” R.S.C., Ord. 11, r. 1(1)(f). This standard is problematic for foreign defendants sued for libel in England because, under British law, a publication takes place where the words are heard or read, and damages are presumed. See, e.g., Berezovsky v. Michaels, [2000] 2 All ER 986, [2000] 1 WLR 1004, [2000] All ER (D) 643 (House of Lords, May 11, 2000). As such, personal jurisdiction may be proper when even one copy makes its way into the hands of an English reader or one person within the country accesses an article on the Internet. While in theory this application is “mitigated by the requirement that in order to establish jurisdiction a tort committed . . . must be a real and substantial one,” id. (citing Kroch v. Rossell (1937) 1 All E.R. 725), in practice English courts are all too willing to

permit personal jurisdiction over a foreign defendant when plaintiffs allege that they have some minimal connection to England or reputation to protect there.

**2. Are you concerned that S. 449 (111th Congress) would impose the First Amendment law of defamation on foreign legal systems— by, among other things, authorizing U.S. courts to enjoin foreign litigants from maintaining suits in foreign courts—especially in cases in which another country has a legitimate interest in the subject matter of the litigation? Please explain.**

In seeking to counter the problem of foreign nations imposing their rules of libel on U.S. authors and publishers, Congress obviously must be careful to avoid exposing itself to the reverse argument that its solution is imposing our rules on them. I do not believe, for example, that U.S. courts should be empowered to provide relief of any kind, let alone injunctive relief, simply because an American has been sued overseas for defamation. As I offered in the Wall Street Journal article I co-authored in January, our courts require personal jurisdiction over any foreign libel plaintiff before any cause of action in this country can be entertained, and we should not abandon our time-tested due process standards in dealing with libel tourism.

I do not believe, however, once personal jurisdiction is properly obtained in the United States over a party who was a libel plaintiff in a foreign tribunal, that we will be guilty of legal one-upmanship if U.S. authors can satisfy a U.S. judge that the foreign case was a sham that really belonged in a domestic court – where it would have failed on First Amendment or common law grounds. I agree, therefore, that the best test for sniffing out libel tourism is one that looks at both substantive libel law as well as the jurisdictional basis for the foreign suit. If procedural unfairness exists in the way a U.S. publisher is subjected to personal jurisdiction overseas, then that factor should also be taken into account by the U.S. legal system.

There plainly are libel cases brought against U.S. publishers overseas that are of legitimate interest to foreign tribunals, as when a U.S. publisher deliberately seeks to reach readers in a foreign market, thus satisfying the “express aiming” standards of Calder and Young that we use in this country. But federal libel tourism legislation should be able to both target the abusers and spare the foreign libel plaintiffs with colorable claims. As I elaborate in my response to question five, anti-SLAPP provisions enacted in many states may provide the subcommittee with ideas for establishing procedures for the federal courts to take steps when foreign libel suits against Americans are abusive.

Once we have legislation that conditions a federal court action against a libel tourist on proper personal jurisdiction in the U.S., we still must find common ground on the appropriate relief. At a minimum, I believe that a libel tourism remedy must include both a declaratory judgment provision as well as a fee-shifting component that would impose all costs and fees associated with the federal and foreign action on the foreign libel plaintiff.

**3. Are you concerned that the enactment of legislation like S. 449 (111th Congress) might encourage other countries to pass or enforce similar legislation to address features of the U.S. legal system they find objectionable? Please explain.**

I believe that if Congress approaches the problem of libel tourism in a manner that respects constitutional due process – that is, we do not overreach in terms of whom we bring into the American legal system for a potential countersuit for damages or declaratory judgment action – we will reduce potential backlash from foreign legal systems. In fact, it is arguable that the publicity we are applying to these issues right now, in particular on U.K. practices, is at least partially responsible for the reform efforts now underway in Parliament and alluded to on page 10 of Laura Handman’s responses to the subcommittee’s questions for the record. I was out of town for the visit of the Culture, Media, and Sports Committee to Washington, but I hope the subcommittee will benefit from the guidance of those who met with the British lawmakers to gather further insight into how U.S. pressure can best contribute to a resolution of libel tourism abuse. I participated in a panel at the American Enterprise Institute on libel tourism on March 23 in which there was discussion of the fact that U.K. libel judgments are now easily enforceable against assets throughout the European Union (except for Denmark). With the U.K. “exporting” its libel law throughout Europe, U.S. efforts to protect the speech interests of its own citizens through carefully-crafted libel tourism legislation looks even more reasonable – and necessary.

**4. Professor Linda Silberman states as follows in her written statement to the Subcommittee (a copy of which is attached): “One should not assume that other countries are oblivious to the concerns of the United States with respect to global defamation. Where the interests of the foreign country are minimal, we have seen foreign courts abstain and/or refuse jurisdiction to hear a libel case against a U.S. publisher” (pp. 10-11). Do you agree with Professor Silberman? Please explain.**

Laura Handman has provided a thorough response to this question, *see* pp. 12-13, and I would simply refer the subcommittee to her answer. I agree with her conclusion that the evidence “hardly suggests a trend.”

**5. If there are any additional points you wish to make—by way of elaborating upon your hearing testimony or responding to the testimony of other witnesses—please do so.**

I would like to elaborate on two issues: 1) the role of anti-SLAPP statutes in the states and 2) national service of process provisions.

#### Anti-SLAPP laws

A bill that provides “teeth” through attorneys’ fees and declaratory judgment would put in place minimum procedures to protect U.S. citizens who find themselves victims of libel tourism without excessively interfering with foreign courts and foreign libel laws.

Statutes have been enacted in 25 states to combat what one legislature called a “disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional

rights of freedom of speech and petition for the redress of grievances.” Cal. Code Proc. § 425.16(a) (2008).<sup>1</sup> I discuss the rise of these SLAPP suits on page 5 and footnote 30 of my written testimony to the subcommittee. One antidote to SLAPP suits are anti-SLAPP laws. The purpose of these laws is clear. As the Illinois legislature wrote, “the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence.” 735 ILCS 110/5 (2008).

These are the same reasons why Congress is rightly concerned about the threat of libel tourism today. Anti-SLAPP statutes provide an expedient, effective way of countering lawsuits meant to suppress free speech by setting clear instructions for courts on how to intervene to stop such abuse and by providing fee-shifting provisions to give the laws some muscle.

The effectiveness of anti-SLAPP statutes stems primarily from their broadly drafted mandates. The most wide-reaching statutes, such as California’s, are triggered any time a person is legally threatened on account of “any act of that person in furtherance of the person’s right of petition or free speech . . . in connection with a public issue.” Cal. Code Proc. § 425.16(b)(1) (2008). Anti-SLAPP laws also provide courts with specific instructions as to how to proceed when their protections are invoked. For example, under Arizona law, the statute directs the court to “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.” A.R.S. § 12-752 (2008). In an effort to provide further guidance, some statutes are explicit about the standard of evidence that should be used in these findings and who carries the burden. Indiana, for example, requires only that the libel defendant show by a preponderance of the evidence that the anti-SLAPP statute applies (Burns Ind. Code Ann. § 34-7-7-9 (2008)), while Illinois requires the libel plaintiff to demonstrate by clear and convincing evidence that the statute does not apply. 735 ILCS 110/20(c) (2008).

Furthermore, to avoid mini-trials at such an early stage of the proceedings,<sup>2</sup> courts generally limit the evidence that may be considered. In California, for example, the statute stays discovery pending resolution of the motion and mandates that the court “shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” Cal. Code Proc. § 425.16(b)(2) (2008). Allowing the taking of evidence through depositions or written discovery would defeat the purpose of an anti-SLAPP statute,

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<sup>1</sup> A state-by-state summary of anti-SLAPP statutes is attached to these responses. Two more states, Colorado and West Virginia, have judicially-created anti-SLAPP doctrines.

<sup>2</sup> Anti-SLAPP motions are often filed as motions to strike the complaint, motions to dismiss, or motions for summary judgment within a set time after service of the complaint. *See, e.g.*, Cal. Code Proc. § 425.16(f) (2008) (motion must be made within 60 days of service of complaint). Furthermore, anti-SLAPP motions must be heard expediently by the court. *See, e.g.*, Cal. Code Proc. § 425.16(f) (2008) (requiring hearing within 30 days of service of motion); 735 ILCS 110/20(a) (2008) (requiring hearing within 90 days of service of motion).

which seeks to protect defendants – early in a proceeding – from expensive and intrusive discovery by stopping meritless claims meant to suppress speech.

Finally, a common feature of anti-SLAPP statutes is the inclusion of attorneys’ fees. Many states have established “one-way” recovery which provides fees and/or costs to the libel defendant if he prevails but not to the libel plaintiff if he overcomes the motion.<sup>3</sup> Including an attorneys’ fees provision in federal libel tourism legislation is essential. It should allow the U.S. defendant in the overseas action to not only recover the fees incurred to defend an enforcement action or bring a declaratory judgment action in U.S. courts, but also to recover attorneys’ fees expended overseas (which in the U.K. can be substantial due to the British “loser pays” system). Such a provision should provide a significant deterrent to potential libel tourists.

#### National service provisions

To make personal jurisdiction as expansive as possible in a federal libel tourism law, Congress could draft a national service of process provision into the bill.

Courts have consistently held that where a federal law contains a national service of process provision, that provision “confer[s] personal jurisdiction in any federal district court over any defendant with minimum contacts to the United States,” rather than merely in any particular forum state, and that the resulting “national contacts” test is consistent with constitutional due process protections. See, e.g., *Med. Mut. v. DeSoto*, 245 F.3d 561, 567 (6th Cir. 2001) (reaffirming that “Congress has the power to confer nationwide personal jurisdiction” and using a national contacts test for personal jurisdiction under ERISA); *Mariash v. Morrill*, 496 F.2d 1138, 1142-43 (2d Cir. 1974) (upholding use of national contacts test for personal jurisdiction under the Securities Exchange Act of 1934).

Such a provision would ensure that a libel tourist who may do intermittent business across the United States but not enough in, for example, New York or California to meet a minimum contacts analysis under the law of either of those jurisdictions, would still be subject to suit in a federal court in the United States. It would also allow the victims of libel tourism to file in any federal court and to serve the complaint anywhere in the United States.

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<sup>3</sup> See A.C.A. § 16-63-506 (2008) (Arkansas); 10 Del. C. § 8138 (2008) (Delaware); 14 M.R.S. § 556 (2008) (Maine); ALM GL ch. 231, § 59H (2008) (Massachusetts); Minn. Stat. § 554.04 (2008) (Minnesota); Nev. Rev. Stat. Ann. § 41.670 (2008) (Nevada); NY CLS Civ R § 70-a (2008) (New York); Utah Code Ann. § 78B-6-1405(1) (2008) (Utah); Rev. Code Wash. (ARCW) § 4.24.510 (2008) (Washington).

Bruce Brown  
Baker & Hostetler  
April 14, 2009

## ANTI-SLAPP STATUTE SUMMARIES

### Arizona

#### *A.R.S. § 12-752 (2008)*

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

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

### Arkansas

#### *A.C.A. § 16-63-501 et seq. (2008)*

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

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

harassing, intimidating, punishing, or maliciously inhibiting a person or entity from making a privileged communication or performing an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the United States Constitution or the Arkansas Constitution in connection with an issue of public interest or concern.” *A.C.A. § 16-63-506* (2008).

### **California**

#### ***Cal. Code Civ. Proc. § 425.16* (2008)**

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

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

### **Florida**

#### ***Fla. Stat. § 768.295* (2008)**

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

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

### **Delaware**

#### ***10 Del. C. § 8136 et seq.* (2008)**

**Standard:** A motion to dismiss or for summary judgment “in which the moving party has demonstrated that the action, claim, cross-claim or counterclaim subject to the motion is an action involving public petition and participation as defined in § 8136(a)(1) of this title shall be granted unless the party responding to the motion demonstrates that the cause of action has a



substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.” *10 Del. C. § 8137* (2008).

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

### Georgia

#### *O.C.G.A. § 9-11-11.1* (2008)

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

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

### Hawaii

#### *HRS § 634F-1 et seq.* (2008)

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

interposed for delay or harassment and that is solely based on the party's public participation before a governmental body."

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

### Illinois

#### *735 ILCS 110/1 et seq. (2009)*

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

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

### Indiana

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

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

**Fee shifting:** “A prevailing defendant on a motion to dismiss made under this chapter is entitled to recover reasonable attorney’s fees and costs.” *Burns Ind. Code Ann. § 34-7-7-7* (2008). On the flip side, “If a court finds that a motion to dismiss made under this chapter is: (1) frivolous; or (2) solely intended to cause unnecessary delay; the plaintiff is entitled to recover reasonable attorney’s fees and costs to answer the motion.” *Burns Ind. Code Ann. § 34-7-7-8* (2008)

#### **Louisiana**

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

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

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

#### **Maine**

##### ***14 M.R.S. § 556 (2008)***

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

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

#### **Maryland**

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

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

**Fee shifting:** None.

**Massachusetts*****ALM GL ch. 231, § 59H (2008)***

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

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

**Minnesota*****Minn. Stat. § 554.01 et seq. (2008).***

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

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

**Missouri*****§ 537.528 R.S.Mo. (2008)***

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

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

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

### **Nevada**

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

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

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

### **New Mexico**

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

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

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

**New York**

*NY CLS CPLR R 3211(g), 3212(h) (2008);*  
*NY CLS Civ R § 70-a (2008); NY CLS Civ R § 76-a (2008)*

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

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

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

**Oklahoma**

*12 Okl. St. § 1443.1 (2008)*

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

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

**Fee shifting:** None.

### Oregon

#### *ORS § 31.150 et seq. (2007)*

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

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

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

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

### Pennsylvania

#### **27 Pa.C.S. § 8301 et seq. (2008)**

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

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

### Rhode Island

#### **R.I. Gen. Laws § 9-33-2 (2008)**

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

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

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



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

### **Tennessee**

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

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

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

### **Utah**

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

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

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

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

### **Washington**

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

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

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

RESPONSE TO POST-HEARING QUESTIONS FROM LAURA R. HANDMAN, ESQ.,  
DAVIS WRIGHT TREMAINE, LLP

**RESPONSES OF LAURA R. HANDMAN, ESQ.,  
DAVIS WRIGHT TREMAINE LLP**  
to Questions for the Record  
Subcommittee on Commercial and Administrative Law  
Hearing on Libel Tourism  
Thursday, February 12, 2009

Questions from the Honorable Steve Cohen, Chairman and the Honorable Trent Franks,  
Ranking Member:

**1. Are you concerned that S. 449 (111th Congress) would impose the First Amendment law of defamation on foreign legal systems - by, among other things, authorizing U.S. courts to enjoin foreign litigants from maintaining suits in foreign courts - especially in cases in which another country has a legitimate interest in the subject matter of the litigation. Please explain.**

The legislative proposals before Congress both have a common goal: protecting the ability of readers in the United States to obtain news and information about matters of public concern. The means to achieve that goal varies between the two proposals, with each striking a somewhat different balance between the protection of First Amendment interests and comity concerns for foreign proceedings. While the injunctive relief provided under S. 449 would be the more direct way to prevent burdening the U.S.-based publisher or author from defending foreign proceedings premised on a libel claim that would not pass muster in the U.S., it would also cause the greatest interference with the foreign tribunal. The restraint reflected in the abstention doctrine whereby federal courts decline to enjoining ongoing state court proceedings<sup>1</sup> may counsel abstention here as well,<sup>2</sup> at least in the absence of a showing of bad faith by the foreign libel claimant in

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<sup>1</sup> *Younger v. Harris*, 401 U.S. 37 (1971).

<sup>2</sup> *Yahoo! Inc. v. La Ligue Contre Le Racism et L'Antisemitism*, 145 F.Supp. 2d 1168 (N.D. Cal. 2001); *aff'd Yahoo! Inc. v. La Ligue Contre Le Racism et L'Antisemitism*, 433 F.3d 1199, 1201 (9th Cir. 2006) (en banc) (affirmed on other grounds).

bringing suit overseas.<sup>3</sup> Other jurisprudential considerations such as ripeness,<sup>4</sup> extra-territorial application of U.S. law<sup>5</sup> and the extension of jurisdiction beyond the limits of due process<sup>6</sup> may be implicated by S. 449, particularly if the foreign jurisdiction was not chosen merely as forum-shopping for the most claimant-friendly law, but because it has a substantial interest in the dispute.

These jurisprudential and comity concerns are not implicated in H.R. 6146 (110th Congress). The House bill, particularly if “teeth” are added, will have many of the same beneficial effects with less intrusion into foreign courts. The “teeth” should include, one, jurisdiction as an additional ground for non-enforcement; two, a declaratory judgment remedy; and, three, speech protective provisions similar to Anti-SLAPP statutes, including an award of attorney’s fees to the U.S.-based publisher or author who is resisting a foreign judgment.

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<sup>3</sup> *Dow Jones & Co. v. Harrod's*, 237 F. Supp.2d 394, 421 (S.D.N.Y. 2002); *aff'd*, *Dow Jones & Co., Inc. v. Harrods Limited*, 346 F.3d 357, 358 (2<sup>nd</sup> Cir. 2003) (District court did not err in declining to exercise jurisdiction under the Declaratory Judgment Act against Dow Jones & Co.’s request for a declaratory judgment and injunction precluding Harrod’s and its chairman from pursuing defamation action against Dow Jones in the United Kingdom).

<sup>4</sup> *Id.*, 433 F.2d at 1221 (3 judges dismissing for lack of ripeness); *Harrod's*, 237 F. Supp.2d at 408-9.

<sup>5</sup> *See, e.g., Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007) (Supreme Court held that Section 271(f) of the Patent Act does not extend to cover foreign duplication of software).

<sup>6</sup> *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 881 N.E.2d 830 (2007).

A. Jurisdiction as an Additional Ground for Non-Enforcement

The Uniform Foreign Money-Judgments Recognition Act, adopted in many states, already has jurisdiction as a grounds for non-enforcement.<sup>7</sup> Professor Silberman, in her testimony, advocated specifically including jurisdiction as a grounds for non-enforcement of a foreign libel judgment.<sup>8</sup>

The willingness of British libel law judges to generously interpret the jurisdictional reach of their courts has enabled foreign claimants to bring suits even when publication in the U.K. amounts to no more than a few hits on the Internet or a few sales of hard copies in the U.K. Here are a few recent examples:

- In 2006, Sheik Khalid Bin Mahfouz won a defamation judgment against American author Rachel Ehrenfeld in London. The English Courts allowed Bin Mahfouz to bring suit against Ehrenfeld in London despite the fact that neither the plaintiff nor defendant were residents in the forum and only 23 copies of the publication were sold in the forum state and a chapter of the book was posted on the Internet.<sup>9</sup>
- The *Washington Times* is currently defending against a defamation claim in a British libel court brought by an international businessman who was awarded, by

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<sup>7</sup> Uniform Foreign Money-Judgments Recognition Act § 4(a)(2-3) (1963). (A foreign judgment is not conclusive if the foreign court did not have personal jurisdiction over the defendant or jurisdiction over the subject matter.) As of 2008, the Uniform Foreign Money-Judgments Recognition Act was in effect in 30 states and territories of the United States.

<sup>8</sup> See *Oversight Hearing on Libel Tourism Before the Subcommittee on Commercial & Admin. Law of the House Judiciary Comm.*, 111th Cong. (2009) (testimony of Prof. Linda J. Silberman (“Silberman”) at 9).

<sup>9</sup> *Bin Mahfouz v. Ehrenfeld*, [2005] EWHC 1156 (QB).

the U.S. government, a contract to sell cell phones in Iraq. The claim was brought in London even though there were no hard copies of the *Washington Times* sold in the U.K. and only “forty or so” hits on its website.<sup>10</sup>

- An Icelandic bank, Kaupthing, sued Danish newspaper *Ekstra Bladet* in London over reports published in the paper that were critical of the bank’s tax advice to wealthy clients. Kaupthing was able to sue *Ekstra Bladet* in London based on a number of articles published on the site that were translated into English.<sup>11</sup> The case settled before it went to trial, with the paper agreeing to pay the bank “very substantial damages”, cover “reasonable legal costs” and to carry an apology on its news site for a month.<sup>12</sup> Kaupthing, Iceland’s largest bank was nationalized last October when the Icelandic banking system collapsed.<sup>13</sup>
- In December of 2008, the English High Court allowed Yanni “Magic Alex” Mardas to proceed with his defamation suit against the *New York Times* and the *International Herald Tribune* despite the fact Mardas was not an English resident, there were only 177 hard copies of the publication sold in England and

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<sup>10</sup> See *Oversight Hearing on Libel Tourism Before the Subcommittee on Commercial & Admin. Law of the House Judiciary Comm.*, 111th Cong. (2009) (testimony of Laura R. Handman (“Handman”), Partner, Davis Wright Tremaine LLP).

<sup>11</sup> See Kristine Lowe, *Ekstra Bladet Agrees to Pay Kaupthing Substantial Libel Damages*, Feb. 13, 2008, [http://kristinelowe.blogs.com/kristine\\_lowe/2008/02/kaupthing-and-e.html](http://kristinelowe.blogs.com/kristine_lowe/2008/02/kaupthing-and-e.html).

<sup>12</sup> *Id.*

<sup>13</sup> See *MPs Demand Bail-Out for Charities*, <http://news.bbc.co.uk/1/hi/business/7982277.stm>.

the websites of the two publications were only accessed four and twenty seven times respectively.<sup>14</sup>

- In 2008, Ukrainian billionaire Rinat Akhmetov sued two Ukrainian news organizations in London. Akhmetov secured an apology and a settlement from one of the defendants, the *Kyiv Post*, despite the fact that the paper only had 100 subscribers in England. Akhmetov then won a default judgment for £50,000 against a Ukrainian news website which only published in Ukrainian and had a negligible number of English readers.<sup>15</sup>

British libel judges have also been quick to hear cases where the foreign claimant has few ties to the jurisdiction. The House of Lords granted French citizen and Oscar-winning director Roman Polanski permission to sue *in absentia* in a London court and appear via video link from Paris because the English judicial system did not preclude a fugitive from U.S. justice system from bringing defamation proceedings in England.<sup>16</sup> In 1989, American oil magnate Armand Hammer instituted a libel suit in London in connection with an unauthorized biography that was distributed primarily in the United States.<sup>17</sup>

Another quirk in the British system is that defendants can be sued in multiple jurisdictions throughout the United Kingdom at the same time. *Forbes* is currently facing

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<sup>14</sup> *Mardas v. New York Times Co.*, [2008] EWHC 3135 (QB).

<sup>15</sup> *Are English Courts Stifling Free Speech Around the World?*, The Economist, Jan. 8, 2009, [http://www.economist.com/world/international/displayStory.cfm?story\\_id=12903058&source=hptextfeature](http://www.economist.com/world/international/displayStory.cfm?story_id=12903058&source=hptextfeature).

<sup>16</sup> *Polanski v. Condé Nast Publ'ns Ltd.*, [2005] 1 All E.R. 945, [2005] UKHL 10.

<sup>17</sup> Handman at 7.

litigation in three different jurisdictions within the United Kingdom over an article that was published in the U.S. edition about the North Pole.<sup>18</sup> Russian businessman Grigori Loutchansky was able to sue the *Times Newspapers* for defamation, once for the article in the newspaper and a second time for the same article on the Internet.<sup>19</sup>

The extension of jurisdiction over such claims has depended on a rule which dates from 1849, when the Duke of Brunswick sent his manservant to a newspaper office to obtain a back issue of the paper in order to sue for the publication of a libel that had occurred 17 years previously.<sup>20</sup> The Court of Queen's Bench ruled that this single sale of an old publication was sufficient to constitute a new act of libel, permitting jurisdiction and starting the statute of limitations running all over again. From this case springs the rule, christened the "Duke of Brunswick rule," that in the United Kingdom each and every defamatory "reading" – even a book accessed in a library or one download from the Internet – is a separate publication giving rise to a cause of action. The Duke of Brunswick rule has been the primary vehicle for the libel tourist.

In the U.S., a few downloads off the Internet would not establish jurisdiction. For jurisdiction to be established over publication on the Internet, the Internet activity must be expressly targeted at or directed to the forum state to establish the minimum contacts necessary to support the exercise of personal jurisdiction over defendant in the forum state.<sup>21</sup> Only when a publication is focused on a subject whose reputation is clearly

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<sup>18</sup> Handman at 6.

<sup>19</sup> *Times Newspapers Ltd. (Nos. 1 and 2) v. United Kingdom*, [2009] ECHR 451.

<sup>20</sup> *Duke of Brunswick v. Harmer*, [1849] 14 QB 185.

<sup>21</sup> *Young v. New Haven Advocate*, 315 F.3d 256, 262 (4th Cir. 2002).



centered in the jurisdiction and the publication is targeted to that jurisdiction, could jurisdiction meet due process standards.<sup>22</sup> Jurisdiction in the overseas court based on anything less, however, should be an express grounds for non-enforcement.

B. Declaratory Judgment Relief.

A declaration by a U.S. court that a foreign judgment is inconsistent with the First Amendment would have many of the benefits of an injunction without enjoining the foreign tribunal. Such a declaration would give U.S. publishers the comfort they would need to be able to publish in the U.S. notwithstanding a contrary verdict in the U.K. Bin Mahfouz, for example, would not have been able to wield his British judgment to deter U.S. publishers who might want to report the same allegations as had been made by Rachel Ehrenfeld, while never having come to the U.S. to enforce the judgment and confront the protections of the First Amendment. A declaratory judgment would also at least have some persuasive, if not dispositive, impact on foreign courts considering the same libel claim. A declaratory judgment in the U.S. would benefit from the broader discovery on falsity permitted in the U.S., creating a more extensive record for use in the overseas jurisdiction as well. A declaratory judgment remedy available before a foreign judgment is issued may, however, raise concerns about ripeness and abstention. (See discussion at 1-2).

Federal legislation can provide the declaratory remedy without extending jurisdiction. Many of the most frequent claimants overseas, be it U.S.-based celebrities or international businessmen, have sufficient ties to the U.S. to permit jurisdiction.

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<sup>22</sup> *Calder v. Jones*, 465 U.S. 783 (1984) (jurisdiction in California over reporters outside the jurisdiction for article about Hollywood star).

Similarly, a foreign order that requires action in the U.S. by the U.S.-based publisher – e.g., take down off the Internet or an apology – may be sufficient for jurisdiction.<sup>23</sup>

C. Anti-SLAPP Remedies

U.K. courts insist on fee-shifting in the event the claimant is successful. This feature, combined with the claimant-friendly laws, accounts for much of the libel tourism. The impact of fee shifting is magnified if the plaintiff's case is being handled by counsel on a conditional fee arrangement ("CFA") – a no win/no fee-arrangement which contemplates, on top of fees, a success fee of up to of 100% of legal fees. Added to this is the cost of insurance that the CFA plaintiff is required to obtain to cover a fee award in the unlikely event he is unsuccessful. Since, as Chairman of the Media Lawyer's Association testified, CFA plaintiffs win 98% of the time,<sup>24</sup> the press defendant frequently must pay costs, plus plaintiff's fees twice over, plus the cost of the insurance, plus defendant counsel's fees. Far more than a damages award, the spectre of fees topping over £1 million,<sup>25</sup> causes U.S. publishers to think twice before publishing in the

<sup>23</sup> *Yahoo!*, 433 F.3d at 1210 (French litigants' obtaining of orders from French court directing Yahoo! to take actions in California, on the threat of substantial penalty, constituted sufficient contact with forum to satisfy "purposeful availment" prong of personal jurisdiction test in Yahoo's action for declaration as to United States enforceability of order).

<sup>24</sup> See *Transcript of oral evidence on press standards, privacy and libel taken before the Culture, Media and Sport Committee of the 55th Parliament* (oral testimony of Marcus Partington, chairman, Media Lawyer's Association), <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcomeds/uc275-i/uc27502.htm>.

<sup>25</sup> Programme in comparative media law and policy, Centre University of Oxford, A Comparative Study of Costs in Defamation Proceedings Across Europe, December 2008; *Oversight Hearing on Libel Tourism Before the Subcommittee on Commercial & Admin. Law of the House Judiciary Comm.*, 111th Cong. (2009) (testimony of Laura R. Handman, Partner, Davis Wright Tremaine LLP).

U.K. or writing about a U.K. resident. More importantly, the threat of these fees and the broad reach of U.K. jurisdiction, leads U.S. publishers not to publish even in the U.S. about a U.S. resident, or settle, post publication, claims that would never have succeeded in the U.S.

To reduce the threat of these crippling legal fees, the federal legislation should follow the Anti-SLAPP statutes which are similarly designed to protect speech from vexatious litigation. First, the U.S. litigant should be able to put the foreign litigant to the test early, before discovery, by allowing an early motion to dismiss or for summary judgment requiring the foreign litigant to establish the probability of success of his claim.<sup>26</sup> Second, if the U.S. litigant is successful in resisting enforcement or obtaining a declaratory judgment, fees incurred in the U.S. proceeding should be awarded as well as fees incurred in the foreign proceeding if brought by a non-U.K. resident. The foreign litigant should only be entitled to fees if the U.S. litigant's effort to resist the foreign libel suit is frivolous. The fee shifting will not only make for a more even playing field but will help make the U.S. litigant whole.

These measures, in combination, will go along way toward discouraging foreign libel tourism without unduly impinging on federal comity concerns for foreign judgments.

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<sup>26</sup> *Nguyen-Lam v. Cao*, 90 Cal. Rptr. 3d 205, 211 (Cal. Ct. App. 2009) (under California Anti-SLAPP statute, on a motion to strike, "plaintiff must demonstrate a probability of prevailing on the claim").

**2. Are you concerned that the enactment of legislation like S. 449 (111th Congress) might encourage other countries to pass or enforce similar legislation to address features of the U.S. legal system they find objectionable? Please explain.**

This may be a pivotal moment in the development of U.K. law and in the law applied under the European Convention on Human Rights. Only this past week, Members of the House of Commons serving on the Culture, Media and Sport Committee were on a fact-finding mission in the U.S. They have met members of Congress, the Judiciary and the First Amendment bar (myself included) and newspapers, including the *Washington Post* and the *New York Times*. They are probing the differences in the two bodies of law to determine why London has become the jurisdiction of choice for foreign libel plaintiffs. Media entities have urged them to consider removing some of the incentives for such forum-shopping.<sup>27</sup>

The European Court of Human Rights just recently considered whether to adopt a common international rule for Internet publication and find that the English rule of multiple publication breached the right to freedom of expression.<sup>28</sup> An alleged Russian mafia boss sued the *Times* of London twice, once for printed articles and a second time for articles in the newspaper's website archives. In the U.S., the second suit would have been barred under the single publication rule, but because, under the Duke of Brunswick rule, each publication is a new libel, the Russian plaintiff could sue twice in the U.K. – and, in theory, “in 100 different countries with 100 different libel laws, giving rise to multiple liability with no clear jurisdiction or how long is too long,” argued the *Times*’

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<sup>27</sup> Submission to Culture, Media and Sport Committee, U.K. Parliament, Mark Stephens, Partner, Finer Stephens.

<sup>28</sup> *Times Newspapers Ltd (Nos. 1 and 2) v. United Kingdom*, [2009] ECHR 451.

counsel, Anthony Lester, QC.<sup>29</sup> The European Court of Human Rights declined in this case to find that the Duke of Brunswick rule, *per se*, violated the Treaty on Human Rights, but suggested that a second suit much later in time would “give rise to a disproportionate interference<sup>30</sup> with press freedom.” The *Times* has said it intends to appeal to the Grand Chamber.

A call for a legislative fix and “international discussion in a forum as global as the Internet itself” of problems of publication of allegedly defamatory material on the Internet was raised as early as 2002 by Justice Kirby of the Australian High Court.<sup>31</sup> In *Dow Jones & Co. v. Gutnick*, where I submitted an affidavit as an expert on behalf of Dow Jones, the Australian courts were the first to wrestle with jurisdictional challenges posed by the Internet. The Australian High Court was constrained to adhere to the Duke of Brunswick rule that a download off the Internet constituted publication, giving rise to jurisdiction, rather than looking to where the article was reported, edited and uploaded on the Internet.

Like the European Courts and U.K. Parliament, the U.S. Congress is attempting to address these concerns. A federal statute codifying the legal precedents established in the *Bachchan* and *Matusevitch* cases will continue to not only prevent U.S. courts from being used in service of unconstitutional judgments but have a beneficial impact on producing

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<sup>29</sup> Afua Hirsch, *Times fails to overturn 'internet publication rule' in court case*, Mar. 10, 2009, [www.guardian.co.uk/media/2009/mar/10/times-european-court-single-publication](http://www.guardian.co.uk/media/2009/mar/10/times-european-court-single-publication).

<sup>30</sup> *Times Newspapers Ltd.*, [2009] ECHR 451 at ¶ 48.

<sup>31</sup> *Dow Jones & Co. v. Gutnick*, [2002] HCA 56.

incremental change in the foreign tribunals and legislatures.<sup>32</sup> For example, the development of the *Reynolds* defense, a departure from the British strict liability toward a fault standard, albeit nowhere as robust as the protection afforded under *New York Times v. Sullivan*, is one such change. Whether the more muscular remedies of injunction and treble damages contained in S. 449 will be counterproductive and cause foreign retrenchment on the modest changes to date, is a matter of speculation but is a risk that must be carefully considered before undertaking these more aggressive remedies at this time.

**3. Professor Linda Silberman states as follows in her written statement to the Subcommittee (a copy of which is attached): “One should not assume that other countries are oblivious to the concerns of the United States with respect to global defamation. Where the interests of the foreign country are minimal, we have seen foreign courts abstain and/or refuse jurisdiction to hear a libel case against a U.S. publisher” (pp 10-11). Do you agree with Professor Silberman? Please explain.**

There have been some instances where British courts have dismissed claims on forum *non conveniens* grounds where the contacts of the plaintiffs with the U.K. were nil and the subject matter of the articles and the evidence at a far remove.<sup>33</sup> While critical of the Duke of Brunswick rule, the court in *Jameel v. Dow Jones & Co.*<sup>34</sup> declined to rule on the jurisdiction issue and instead dismissed the case as an abuse of process because, given

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<sup>32</sup> As the Rt. Hon. Denis McShane said in a statement before Parliament, libel tourism “shames Britain and makes a mockery of the idea that Britain is protection of core democratic freedoms.” Remarks of the Rt. Hon. Denis McShane before Parliament on Libel Tourism, Dec. 17, 2008, <http://www.publications.parliament.uk/pa/cm2008091cmtransvalcm081217/hallex182170001.htm>.

<sup>33</sup> *Chadha v. Dow Jones & Co.*, [1999] E.M.L.R. 724, [1999] I.L. Pr. 829, [1999] EWCA Civ. 1415; *Wyatt v. Forbes*, slip op. (High Ct. of Justice, Queen's Bench Division, Dec. 2, 1997).

<sup>34</sup> *Jameel v. Dow Jones & Co.*, [2005] EWCA Civ. 75.

the five Internet hits, plaintiff would not be able to establish substantial damages. In none of these cases was jurisdiction refused; dismissal was on other more discretionary grounds.

In no other case of which I am aware out of the dozens brought by foreign litigants with minimal U.K. publication or minimal U.K. connections, has a British court declined to entertain the claim. Indeed, the only other case cited by Prof. Silberman where “foreign courts abstain and/or refuse jurisdiction to hear a libel case against a U.S. publisher” (Silberman at 10-11), is a decision by an Ontario court – not a London court – which refused to find jurisdiction over the *Washington Post* for an article on its website where plaintiff was not an Ontario resident at the time of publication and publication was not deemed substantial.<sup>35</sup> This record hardly suggests a trend of restraint in the exercise of jurisdiction in foreign courts.

**4. If there are any additional points you wish to make – by way of elaborating upon your hearing testimony or responding to the testimony of other witnesses – please do so.**

Professor Silberman has urged restrictions on the remedy of non-enforcement, suggesting that U.S. courts enforce foreign libel judgments, even if inconsistent with the First Amendment, if U.S. interests are not otherwise implicated. Those “interests” would be measured, Professor Silberman urged, by factors borrowed from conflict of law principles such as where the article was published and the respective parties’ contacts with the U.S. Based on those considerations, Professor Silberman is critical of the 6-1 decision of Maryland’s highest court in *Telnikoff v. Matusevitch*.<sup>36</sup>

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<sup>35</sup> *Bangoura v. Wash. Post*, [2005] 258 D.L.R. (4th) 341 (Can.).

<sup>36</sup> Silberman at 5.

Professor Silberman poses the right question: “When does a country itself have interests that are sufficiently implicated to warrant application of its own public policy.”<sup>37</sup> But, in my view, *Telnikoff*<sup>38</sup> illustrates exactly why the U.S. interests in that case required non-enforcement and why U.S. interests require non-enforcement whenever a judgment antithetical to the First Amendment is obtained by a public official or public figure or involves an article about a matter of public concern. Federal legislation should not require any additional showing before a U.S. court would be required to deny enforcement to such a judgment.

Matusevitch was, in fact, a U.S. citizen, born in Brooklyn of Russian Jewish parents who had emigrated to the U.S. in 1936. At the time of the suit in London, he was living in London, working for the United States entity, Radio Free Europe. But he had returned to live in the U.S. when Telnikoff came to Maryland to enforce his British judgment. These U.S. contacts, however, were not the reason the Maryland Court felt compelled to refuse enforcement.

Telnikoff published his op-ed column in a British publication, the *Daily Telegraph*, and Matusevitch published his allegedly libelous letter to the editor commenting on Telnikoff’s op-ed in the same paper. At the time, the Internet was only in its infancy. Now, there are no borders, every publication is on the web, accessible by readers the world over. If Matusevitch’s letter or its current equivalent could not remain on the Internet, readers in the U.S. would not have been able to read his criticism of what he called Telnikoff’s “racialist recipe,” that the BBC hired, in Telnikoff’s words, too

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<sup>37</sup> Silberman at 6.

<sup>38</sup> 702 A.2d 230 (Md.1997).



many “Russian-speaking national minorities” and not enough of “those who associate themselves ethnically, spiritually and religious with the Russian people.” The Soviet history of anti-Semitism is not a subject only of interest to the *Daily Telegraph*’s British readers but no doubt of concern to Matusevitch’s family in Brooklyn and many readers the world over. The *Telnikoff* decision, like the *Bachchan* decision before it, did not involve some minor differences of procedure or law, but fundamental, out-come determinative differences at the heart of the First Amendment, involving opinion, falsity, fault and the burden of proof. Both cases involved matters of deep public concern and Bachchan was a quintessential public figure.

The U.S. “interest” in *Telnikoff* and similar cases is compelling: U.S. readers should not be deprived of information of public concern because publishers and authors are threatened with crippling libel judgments where the legal system clearly favors the libel claimant – a system 180 degrees opposite to the protections for the libel defendant at the core of the First Amendment. The U.S. interest is making sure the coercive power of our courts – to attach, garnish, impose liens – is not mobilized to enforce judgments so antithetical to our fundamental protections. The U.S. interest is preventing the use of our courts’ authority and credibility as a stamp of approval for such endeavors.

“Public policy” is grounds for non-enforcement in the Uniform Foreign Money-Judgment Recognition Act,<sup>39</sup> “public policy” is a factor in traditional choice of law considerations<sup>40</sup> and “public policy” has been grounds for British courts to refuse to

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<sup>39</sup> Silberman at 4.

<sup>40</sup> Restatement (Second), Conflict of Laws, § 117.

enforce U.S. judgments, such as treble damages awards in U.S. antitrust judgments.<sup>41</sup>

Indeed, as far back as the late 1770s, a British court ruled that no slave who reached British territory of his own free will, would be sent back to the U.S.<sup>42</sup> The British courts refused to enforce American law because returning an escaped slave was so repugnant to British first principles. The United States should similarly decline to enforce foreign libel judgments so repugnant to our first principles, as embodied in the First Amendment.

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<sup>41</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 920 (D.D.C. 1984). In my written testimony submitted to the House Judiciary Subcommittee on Commercial & Admin. Law on February 12, 2009, I stated that the United States is not currently a party to any treaties or international agreements governing the recognition and enforcement of judgments rendered by the Courts (*see* Handman at 9). I would like to amend my testimony to reflect that, although the United States is currently not a party to any treaties or international agreements governing the recognition and enforcement of judgments rendered by the Courts, we are a signatory to the Hague Convention (of June 30 2005) on Choice of Court Agreements, signed January 19, 2009 by outgoing State Department Legal Advisor, John Bellinger. Although the agreement has not been ratified by the Senate, once ratified, it would not affect enforcement of foreign libel judgments since it pertains only to enforcement of written agreements where the parties have designated choice of courts. *See* M. George, *EU Signs Hague Choice of Court Convention*, Conflicts of Laws.Net (April 5, 2009), available at <http://conflictsoflaws.net/eu-signs-hague-choice-of-law-convention/>.

<sup>42</sup> *Somerset v. Stewart*, (1772) Lofft 1, 98 E.R. 499.

RESPONSE TO POST-HEARING QUESTIONS FROM LINDA J. SILBERMAN, PROFESSOR,  
NEW YORK UNIVERSITY SCHOOL OF LAW

**Questions for the Record  
Subcommittee on Commercial and Administrative Law  
Hearing on Libel Tourism  
Thursday, February 12, 2009**

**Linda J. Silberman, New York University School of Law**

**Questions from the Honorable Steve Cohen, Chairman and the Honorable Trent Franks,  
Ranking Member:**

**1. S. 449 (111th Congress) was recently introduced in the Senate. Section 3(b) of that bill provides:**

**The district court shall have personal jurisdiction under this section if, in light of the facts alleged in the complaint, the person or entity bringing the foreign suit described in subsection (a) served or caused to be served any documents in connection with such foreign lawsuit on a United States person with assets in the United States against which the claimant in the foreign lawsuit could execute if a judgment in the foreign lawsuit were awarded.**

**Would the Constitution permit the exercise of personal jurisdiction under section 3(b)? Why or why not?**

I do not believe that Section 3(b) of S.449 is constitutional. Under that provision, personal jurisdiction is authorized if a person bringing a foreign lawsuit “served or caused to be served any documents in connection with . . . a foreign lawsuit on a United States person with assets in the United States . . .”.

The Due Process Clause of the U.S. Constitution has been interpreted by the Supreme Court of the United States to require that a defendant have minimum contacts with the forum state and that the exercise of jurisdiction be reasonable. See *Asahi Metal Industry Co. Ltd. v. Superior Court*, 480 U.S. 102 (1987). More specifically, those “contacts” must involve purposeful conduct” by the defendant directed to the forum state. The Supreme Court has made clear that mere foreseeability of an effect in the United States is not sufficient. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

The attempt in S.449 to have “service of documents” fulfill the requirement of “purposeful conduct” is strained to say the least. In almost every country, a plaintiff will be required to give a defendant notice of a lawsuit in order to establish the fairness of the proceeding. Thus, there will be an obligation imposed by the foreign jurisdiction in which suit is brought that the plaintiff serve process upon the defendant. One can hardly equate that type of mandatory service/notice requirement of the foreign jurisdiction as equivalent to the type of purposeful conduct on the part of the defendant that the Supreme Court views as conferring a

benefit on the defendant such that it is fair to make the defendant amenable to jurisdiction in the United States. Indeed, the United States is party to an international convention on service of process – The Hague Service Convention – which requires countries party to that Convention to transmit judicial documents to a Central Authority in the country where service is to be made. It would be strange if an obligation imposed by treaty in international litigation was transformed into a basis for asserting jurisdiction over a party carrying out a requirement imposed by a country as a matter of its treaty obligation. I also think it is a fair read of the Ninth Circuit’s en banc opinion in *Yahoo v. La Ligue Contre Le Racisme*, 433 F.3d 1199 (9th Cir. 2006) to say that in its view service of process in the U.S. to commence a foreign lawsuit cannot itself constitute a basis for the assertion of jurisdiction by the United States. The court stated “If we were to hold that such service were a sufficient basis for jurisdiction, we would be providing a forum-choice tool by which any United States resident sued in a foreign country and served in the United States could bring suit in the United States, regardless of any other basis for jurisdiction. We are unaware of any case so holding, and Yahoo! has cited none”. 433 F.3d at 1209.

**2. The sponsors of S. 449 wrote a letter to *The Wall Street Journal* in which they contended that**

**U.S. courts do not ordinarily have authority to exercise personal jurisdiction over a person merely because he files suit in a foreign country. But when a person files a defamation case against a U.S. writer and then serves legal papers in the U.S. on the writer—and this action is intended to intimidate our journalists and publishers and circumvent First Amendment protections—there is a basis for asserting personal jurisdiction. (Letter to the Editor, Arlen Specter *et al.*, *Confronting Libel Tourism Properly*, Wall. St. J., Jan. 23, 2009.)**

**Do you agree? Why or why not?**

I also disagree with the view of the sponsors of S. 449 that the “effects” of a foreign lawsuit – even one for defamation that may intimidate U.S. journalists and publishers in their exercise of First Amendment rights – is a basis for the exercise of jurisdiction over the plaintiff in the foreign lawsuit. The Supreme Court’s decision in *Calder v. Jones*, 465 U.S. 783 (1984) would seem to require that a defendant’s intentional and tortious conduct be “expressly aimed” at the forum state. I doubt that one could realistically characterize the filing of a foreign lawsuit as an “intentional tort” directed to the chilling of speech in the United States when the foreign plaintiff is attempting to recover damages for defamation when there is some harm in the foreign jurisdiction. As I mentioned in my oral testimony, the decision in *Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.2d 1199 (9th Cir. 2006) (rehearing en banc) offers some support for the proposition that where a foreign lawsuit creates an effect on the U.S. party in the United States *and there are additional contacts*, jurisdiction may in some circumstances meet the constitutional standard. The court majority in *Yahoo* (in an 8-3 ruling on the jurisdictional issue) relied on three contacts: a cease and desist letter sent by the foreign party to the American defendant, service of process on an American defendant in California, and an order from the French court that directed the

American party to take action in the United States. Even on these facts --- which are more substantial than just an effect in the United States --- the panel majority observed that it was a “close question” whether the plaintiffs in the French action were subject to personal jurisdiction in California.

Indeed, there were three dissenting opinions, each focusing on different reasons but agreeing that jurisdiction in this case was unconstitutional. The reasons for lack of jurisdiction included (1) that the French parties did not intentionally aim their lawsuit in France at Yahoo! in California but rather at Yahoo’s actions in France; (2) that wrongfulness of a defendant’s conduct is a key element in the “express aiming” analysis and that the French parties’ connections with California were incidental to their legitimate exercise of rights under French law and that they should not anticipate being haled into court in California; and (3) that the “effects” on Yahoo! in California were not the acts of the French plaintiffs but rather of the French court. At the end of the day, the *Yahoo!* case was dismissed by the Ninth Circuit because three of the eight judges who thought there was personal jurisdiction did not believe the case was “ripe” because there had been no attempt to enforce the French judgment. Those three judges and the three judges who thought the case should be dismissed for lack of jurisdiction comprised a majority of the panel and resulted in dismissal of the case.

It is unfortunate that the *Yahoo!* case did not reach the Supreme Court of the United States so that we would have a definitive ruling on the jurisdictional point. But even were it correctly decided (and I think it was not) the facts in *Yahoo!* are sufficiently different from an ordinary foreign defamation suit that merely awards money damages to a foreign plaintiff who is likely not to have taken any action in the United States. I do not believe that even the *Yahoo!* case justifies jurisdiction in the circumstances detailed by Senator Specter.

**3. Are you aware of any federal or state laws like S. 449 (111th Congress) or state common law causes of action under which a foreign plaintiff can be liable for damages or injunctive relief in a U.S. court as a result of filing a civil action in a foreign country? If so, please identify and summarize any such laws.**

The two statutes I am aware of are those of New York and Illinois. I summarize them in fn. 14 of my written testimony, and I repeat that footnote here:

Two states, New York and Illinois, have passed their own “libel tourism” laws. In 2008 New York amended its version of the Uniform Act to provide that a defamation judgment obtained outside of the United States need not be enforced unless the court in New York determines that the defamation law applied by the foreign court provides “at least as much protection for freedom of speech and press . . . as would be provided by both the United States and New York Constitutions.” CPLR §5304(b)(8)(2008). In addition, New York amended its jurisdictional statute, CPLR §302(a), to provide that any person who obtains a judgment in a defamation proceeding outside the United States against a New York resident or person amenable to jurisdiction in New York with assets in New York is subject to jurisdiction in New York for the purpose of obtaining declaratory relief, provided the alleged defamatory publication was made in New York and the person against whom the judgment was rendered has assets in New York or may have to take action in New York to comply with the judgment. Illinois

amended its version of the Uniform Foreign Money-Judgments Recognition Act to add an additional ground for non-enforcement: “when the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless a court sitting in this State first determines that the defamation law applied in the foreign jurisdiction provides at least as much protection for freedom of speech and the press as provided for by both the United States and Illinois Constitutions.” 735 ILCS 5/12-621(b)(7)(2009). Illinois also amended its jurisdictional statute to allow for jurisdiction over Illinois residents for the purpose of rendering declaratory relief provided the publication was published in Illinois and the resident has assets in Illinois to satisfy the judgment or may have to take action in Illinois to comply with the judgment. 735 ILCS 5/2-209(b)(5)(2009).

**4. You note in your written statement that state law governs the recognition and enforcement of foreign judgments in U.S. courts (p. 2) and that every state’s law denies enforcement of foreign judgments deemed “repugnant to the public policy of the state” (p. 4). Is it possible that a foreign defamation judgment will be enforceable in one state but not in another?**

Yes, although the standards for recognition and enforcement in the various state laws are generally uniform, we have seen some states (see New York and Illinois above) enact special provisions that make it clear they would not enforce foreign libel judgments of any kind. In other states, there may be more debate about just what kind of judgment would be deemed to be repugnant to the public policy of the state. And one state might find a particular judgment is repugnant to public policy and another state that it is not.

**5. A reporter’s comment accompanying the American Law Institute’s *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* (2006) notes that a debate has arisen in “academic journals” as to “whether there are some foreign judgments that do not rise to the level of ‘repugnance to the public policy of the United States’ even though the underlying claims would trigger First Amendment concerns if brought in the United States” (p. 80). Are there some foreign defamation judgments that would be enforced under the “public policy exception” but denied enforcement under H.R. 6146 (110th Congress)? Please explain.**

The Reporters’ Note here was suggesting that there might be matters of “detail” – perhaps something like who should be considered a public figure, assuming that the foreign jurisdiction imposed a requirement similar to *New York Times v. Sullivan*. Thus, even if the U.S. definition of who would be considered a public figure is different than the foreign jurisdiction’s definition, the libel judgment might still be enforceable. The point is that there may be matters of difference between U.S. and foreign libel law that are “significant” and others that are less critical. Recognition and enforcement of foreign judgments is itself an important international obligation, and should be resisted only when the policy differences are of sufficient magnitude.

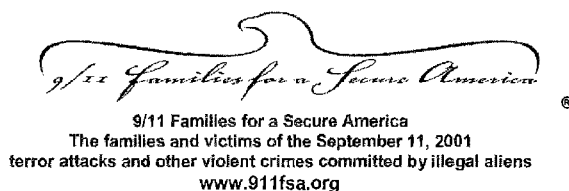
**6. If there are any additional points you wish to make—by way of elaborating upon your hearing testimony or responding to the testimony of other witnesses—please do so.**

There is one general observation I would like to make to add to the thinking about what type of federal statute is appropriate to protect First Amendment rights of U.S. citizens in the context of the “libel tourism” problem. The type of constitutional protection that the United States gives to speech in the context of defamation lawsuits is not generally accepted in the rest of the world, and in this respect the United States is something of an outlier. Although a number of countries have moved closer to the U.S. view, see *Jameel v. Wall Street Journal Europe*, [2006] UKHL 44, many countries give greater weight to an individual’s reputation and favor plaintiffs in balancing the protection of speech against the harm to an individual resulting from defamation. In the context of recognition and enforcement of judgments, it is appropriate for the United States to exercise its regulatory and sovereign authority to refuse to recognize or enforce a foreign judgment when it determines that legitimate U.S. interests are undermined, as would be the case when a foreign judgment has been rendered against a U.S. publication that publishes at least in part in the United States. However, to the extent that other countries strike the balance between reputation and speech differently and substantial harm has occurred in that other country, the United States should not go further than the refusal of recognition and enforcement to the foreign judgment. The United States should not overreach by creating a U.S. cause of action, imposing treble damages, or creating a clawback statute.

Another point to be made about the *Ehrenfeld* case is that there was no attempt by Dr. Ehrenfeld to object to the jurisdiction of the English court’s exercise of jurisdiction. Had such an objection been made in the English court, it is possible that the court might have determined that England was not the appropriate forum for that action. Also, the prevailing party in a foreign action is generally able to recover the costs of the action, including attorneys’ fees.

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PREPARED STATEMENT OF THE 9/11 FAMILIES FOR A SECURE AMERICA



August 18, 2008

9/11 Families for a Secure America urges passage of the Free Speech Protection Act of 2008 introduced by Rep. Peter King and Anthony Weiner, and Senators Arlen Specter and Joseph Lieberman, and co-sponsored by Senator Chuck Schumer.

9/11 Families for a Secure America represents the families of over three hundred of the victims of the September 11 terrorist attacks. We thus have a particular interest in the fullest exposure of all those who have been connected, directly or indirectly, with facilitating the mass murders by Moslem terrorists which killed our loved ones.

It could not be clearer that to allow Americans' freedom of speech to be infringed by the libel laws of other nations will prevent investigation which is essential to exposing those who are guilty. The libel suit brought in English courts by Khalid Bin Mahfouz against Rachel Ehrenfeld is a perfect example of the use of foreign law by a person with connections to terrorism to prevent American investigators *in the United States* from exposing his guilt.

The members of 9/11 FSA believe that the United States Constitution should remain, as intended by the Founders, to be the supreme law of our country. Judgments won in foreign courts which have the effect nullifying rights guaranteed by the Constitution, should not merely remain unenforceable in the courts of the United States, but the intended victims of these foreign judgments should be permitted to obtain damages from the plaintiffs.

The Free Speech Protection Act of 2008 (H.R. 5814 & S. 2977) will have the effect of protecting not merely the First Amendment rights in America, but will by promoting exposure of terrorist financiers, provide increased security for the Nation as a whole.

The Board of Directors  
9/11 Families for a Secure America





LETTER FROM PATRICIA S. SCHROEDER,  
THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.

Association of American Publishers, Inc.  
www.publishers.org



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Patricia S. Schroeder  
President and  
Chief Executive Officer

The Honorable Peter King  
United States House of Representatives  
Washington, DC 20515

By Fax: 202-226-2279

Dear Congressman King:

On behalf of the more than 300 publishing houses who are members of the Association of American Publishers, we are writing to thank you for sponsoring H.R. 5814, the "Free Speech Protection Act of 2008." We are grateful for your leadership in focusing Congressional attention on the serious threat of "libel tourism."

American authors and publishers need support in defending their free speech rights, which are being seriously undermined by "libel tourists." These wealthy individuals cynically exploit plaintiff-friendly libel laws in foreign courts in order to intimidate and silence American authors and publishers who are writing and publishing things they don't like. Even in the absence of an attempt to enforce a foreign libel judgment here, the very existence of such a judgment can—and has—chilled the kind of reporting that our laws are designed to encourage and protect.

While several of the most recent high-profile examples of libel tourism, such as the *Ehrenfeld* case, involve judgments obtained in England by Saudis implicated in the funding of terrorism, the threat is wider and more insidious. The sale of books over the Internet exposes American authors and publishers to the danger of being sued almost anywhere in the world, and libel tourism remains a threat in any country where our strong constitutional protections for speech are absent.

We hope Congress will act quickly to defuse the threat of libel tourism, and we look forward to working with you to bring this about.

With kind regards,

Sincerely,

*Patricia S. Schroeder*  
Patricia S. Schroeder

Thanks!

WALL STREET JOURNAL ARTICLE ENTITLED "FOREIGN LAW AND THE FIRST AMENDMENT," BY FLOYD ABRAMS

Foreign Law and the First Amendment - WSJ.com

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**THE WALL STREET JOURNAL**  
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OPINION | APRIL 30, 2008

## Foreign Law and the First Amendment

By FLOYD ABRAMS

Late in 1941, the U.S. Supreme Court issued an opinion which, for the first time in our history, starkly distinguished American protection of speech from that of England.

Two union members had been convicted of assaulting nonunion truck drivers. The day before they were to be sentenced, the Los Angeles Times published an editorial urging the trial judge not to grant probation, but to punish the transgressors severely: "This community," the editorial asserted, "needs the example of their assignment to the jute mill."



Getty Images

Contempt of court proceedings were brought against the newspaper. California law at the time, like that of other states, was rooted in English law, under which such commentary, aimed at a judge during a trial, constituted contempt. Under English law, both then and today, such speech is punishable by massive fines or even imprisonment.

In reversing the ruling of the California courts holding the newspaper in contempt, the Supreme Court set this country on a different course. "No purpose in ratifying the Bill of Rights was clearer," Justice Hugo Black wrote, "than of securing for the people of the United States much greater freedom of . . . expression . . . than the people of Great Britain had ever enjoyed."

Today, there are sharp distinctions between U.S. and English law. One difference is that under the First Amendment we provide far more protection for speech that is claimed to be libelous.

There is no need for democratic nations to agree upon such matters. 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.

But a serious problem has surfaced. In recent years, English libel law has come to have a disturbing impact on the right of Americans to speak out.

England has become a choice venue for libel plaintiffs from around the world, including those who seek to intimidate critics whose works would be protected in the U.S. but might not in that country. That English libel law has increasingly been used to stifle speech about the subject of international terrorism raises the stakes still more.

<http://online.wsj.com/article/SB120951734327554697.html>

7/6/2009

The case against Rachel Ehrenfeld in England by Saudi banker Khalid Bin Mahfouz is illustrative. Her 2003 book "Funding Evil: How Terrorism is Funded and How to Stop It" dealt at length with one of the most significant (and difficult and dangerous to research) topics – the funding of terrorism. The conduct of Mr. Bin Mahfouz as a possible funder of terrorism was one of the subjects discussed in the book, which was published in New York.

Twenty-three copies of the book were sold in England. On that slim basis, Mr. Bin Mahfouz sued there, claiming that his reputation had been gravely harmed.

Ms. Ehrenfeld (on the advice of English counsel) refused to appear before the English courts, and a judgment against her was entered in the amount of \$225,000. At any time, Mr. Bin Mahfouz could seek to enforce that judgment. Whether or not he does, the harm to Ms. Ehrenfeld's reputation remains real.

She sought a declaratory judgment in New York determining that the English judgment was not enforceable here, and that her work was protected under American law. But the New York Court of Appeals determined that her suit could not be heard under state law. Any change in that law, the court concluded, was up to the New York legislature.

To the surprise of those who denigrate the ability of the New York legislature to act decisively, both the Assembly and its Senate have unanimously passed a bill that would give Ms. Ehrenfeld and other citizens who are sued for libel abroad the right to obtain a declaration here that their works are protected under American law.

Gov. David Paterson has until the end of today to decide whether or not he will sign the bill. Meanwhile, the Ehrenfeld saga has led Rep. Peter King (R., N.Y.) to propose federal legislation which would provide similar relief.

The need for such legislation has become very real – all the more so since English libel law is increasingly being used to limit public debate about terrorism. Mr. Bin Mahfouz has personally commenced or threatened to commence at least 30 law suits in England. This tactic has served him well in obtaining libel judgments that would be unthinkable as well as unconstitutional here. The danger is that other American writers and publishers will shy away from this crucial subject, out of fear of being sued far from home.

This is a reasonable concern as a good deal of litigation related to reporting on terrorism has been threatened or started in England by individuals who have limited contact with that nation, but who find its libel law congenial.

England should be free to choose its own libel law. But so should we. It is not too much to ask that American law should protect our people when they speak in precisely the "uninhibited, robust and wide-open" manner that the First Amendment was drafted to protect.

**Mr. Abrams is a partner in the law firm of Cahill Gordon & Reindel LLP and the author of "Speaking Freely: Trials of the First Amendment" (Viking, 2005).**

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LETTER FROM CAROLINE FREDRICKSON, DIRECTOR, WASHINGTON LEGISLATIVE OFFICE, AND MICHAEL W. MACLEOD-BALL, CHIEF LEGISLATIVE AND POLICY COUNSEL, THE AMERICAN CIVIL LIBERTIES UNION (ACLU)

WASHINGTON  
LEGISLATIVE OFFICE



September 17, 2008

U. S. Senator Arlen Specter  
United States Senate  
711 Hart Senate Office Building  
Washington, DC 20510

Re: **ACLU Supports S. 2977 – Free Speech Protection Act of 2008**

Dear Senator Specter:

On behalf of the American Civil Liberties Union (ACLU), its more than half a million members, countless additional activists and supporters, and fifty-four affiliates nationwide, we write in strong support of S. 2977, the Free Speech Protection Act of 2008. This bill would address the growing problem of libel tourism, whereby individuals seek libel judgments in foreign countries where libel laws do not have the same free speech protections as in the U.S.

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. Distribution of a single book or viewing a statement on the Internet by just one person can be enough to become subject to a foreign judgment for 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 winning a defamation claim. Under our Constitution's First Amendment, the free speech right gives strong protection to those who discuss public figures or matters of public interest.<sup>1</sup>

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 there by a Saudi businessman who claimed the book defamed him. In the proceedings in England, the court focused on the availability of the material in the jurisdiction. The court paid little notice that neither Ehrenfeld nor the plaintiff had any substantial connection to the U.K. or that the book was published and distributed only in the U.S. (except for the 23 copies and the online release of the book's first chapter). Acknowledging the unfair British

<sup>1</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

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standard, Ehrenfeld did not appear and judgment was entered against her. Her attempt to have the judgment declared unenforceable in the U.S. for non-compliance with American First Amendment norms failed – the court determining that it had no jurisdiction over the Saudi businessman unless and until he came the U.S. to enforce his claim.

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. Speech cannot be restricted without the danger of making the government the arbiter of truth. Therefore, we regard the existence of a right of action for defamation arising out of a discussion of a matter of public concern to violate 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. Proposed language in S. 2977 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. The bill would entitle U.S. speakers to bring a claim against foreign judgment holders if and when they attempt to serve court papers here. The bill would only render the foreign judgment unenforceable if the foreign lawsuit "does not constitute defamation under United States law".

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 which are far closer to international standards than those of Great Britain. In fact, in July 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.<sup>2</sup>

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.

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<sup>2</sup> 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).

With support of such international authorities, we believe that passage of the bill with modifications proposed by Senator Specter will 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. At its core, this bill helps the United States to stand as a beacon for the preservation of individual free speech rights and encourages other nations to adopt similarly strong standards.

Thank you for your efforts to improve and enact this important legislation. If you have any questions, please contact Michael W. Macleod-Ball at 202-675-2309 or by email at [mmacleod@dcacfu.org](mailto:mmacleod@dcacfu.org).

Sincerely,



Caroline Fredrickson  
Director, Washington Legislative Office



Michael W. Macleod-Ball  
Chief Legislative and Policy Counsel

The Honorable Charles E. Schumer  
United States Senate  
Washington, DC 20510

As an organization committed to upholding the Freedom of Speech enshrined in the Constitution, the Anti-Defamation League welcomes your leadership in introducing the Free Speech Protection Act of 2008, legislation which would prevent US courts from enforcing foreign libel judgments against Americans in violation of the First Amendment.

The right of free expression is under attack around the world by those who wish to stifle it in the name of opposing "defamation." The practice of suing Americans for allegedly "defamatory" speech in foreign courts is another disturbing manifestation of this trend. Enactment of this legislation is necessary to ensure protections of Americans' broad free speech rights under the Constitution and we hope the Senate will be able to pass it before Congress adjourns.

The degree to which speech is protected under US law is unique and Congress should be vigilant in ensuring that all Americans can freely promote public discourse and debate without fear of US courts enforcing judgments of foreign courts against constitutionally-protected speech.

Sincerely,

Abraham H. Foxman  
National Director

cc: Jess N. Hordes, ADI, Washington Director

[illegible]

PRESS RELEASE FROM THE AMERICAN JEWISH CONGRESS



Contact: (212) 360-1547  
[Communications@ajcongress.org](mailto:Communications@ajcongress.org)

**For Immediate Release**

### **AJCongress Hails Step to Protect Free Speech Backs Reps. Cohen's and King's 'Libel Tourism' Bills in House, Lieberman/Specter Bill in Senate**

May 27, 2008 — The American Jewish Congress today announced its support for efforts in both the U.S. House of Representatives and Senate to protect American journalists from libel suits brought in foreign courts that do not have the same protections for free speech that are found in the U.S. Constitution.

"Excellent bills on this subject have been introduced in the House – H.R. 6146 by Rep. Steve Cohen (D-TN) and H.R. 5814 by Rep. Peter King (R-NY) – as well as in the Senate – S2997 by Senators Arlen Specter (R-PA) and Joseph Lieberman (I-CT)," said AJCongress President Richard S. Gordon. "AJCongress considers these bills an important step toward protecting free speech throughout the United States."

Although a few states have already made it clear that they will not enforce foreign defamation judgments antithetical to American concepts of free speech, most have not spoken on the issue. When enacted, the final version of this bill will provide a uniform level of protection all across the country for this federally protected right.

"When a final version of this bill passes, Congress will send a clear message that America will not stand for intimidation and threats against free speech," Mr. Gordon said. "The bill will help to protect this most essential of our political liberties."

'Libel Tourism' describes a tactic in which people described negatively in American publications roam the world to search out friendly venues in which to sue American authors.

AJCongress had previously extended strong support for 'Libel Tourism' legislation passed by the New York State legislature and signed into law earlier this year.



“The current international climate has made it all the more urgent for Congress to act,” said John Wohlstetter, Project Coordinator for AJCongress’ Project to Preserve Free Speech. “Free speech is increasingly chilled by violent threats as well as the more sophisticated ‘Libel Tourism.’ Americans need to let the world know that our commitment to the right of free speech is unshakable. No one should make the mistake of thinking we won’t stand firm.”

The fundamental principles behind the two bills in the House are essentially the same: that neither the federal or state courts should enforce judgments arising from foreign defamation suits that are inconsistent with the First Amendment. While there are some differences between the two bills, these differences are not unbridgeable. Each version has its advantages. “We urge the respective sponsors to meet to produce a common bill, enjoying bi-partisan support, and we urge the relevant House and Senate committees to hold prompt hearings on this urgently needed legislation,” Mr. Wohlstetter said.

The bills will close off a legal loophole that currently leaves American writers and journalists vulnerable to defamation judgments against them in foreign courts of law for works first published in the United States.

“As things stood before, if an American writer lost a libel suit in a foreign country and had a judgment entered against him or her, a foreign plaintiff could collect such a judgment in this country,” Mr. Wohlstetter explained.

The need for this legislation was clearly demonstrated by a decision last year in the New York Court of Appeals that New York courts lacked jurisdiction to protect free speech for its citizens against attempts by foreign persons to collect in the United States after winning a defamation suit in a foreign country, where defamation suits are much easier to win than they are in the United States. That decision left author Rachel Ehrenfeld defenseless against the Saudi national Khalid Salim Bin Mahfouz, who had successfully sued her in a UK court on the grounds that in her 2003 book, “Funding Evil: How Terrorism is Financed — and How to Stop It,” she had defamed him by alleging that he is a financial supporter of terrorism.

“Foreign countries may enforce within their area of jurisdiction, their defamation laws. But they cannot enforce those laws in the U.S. that violate our free speech traditions,” Mr. Wohlstetter said. “The United States, with its proud tradition of freedom of speech, should not, however, lend a hand to enforcing judgments that are fundamentally at odds with our own political liberties.”

“AJCongress is committed to pushing for legislation on the state and federal level to protect Americans’ First Amendment rights, and to stop terrorists not only from

chilling negative comments by opponents who are afraid of a potential foreign lawsuit, but also financing their activities. One of the founding and enduring principles of AJCongress is to continue to fight to maintain First Amendment rights. We have been doing this for almost 90 years. While Libel Tourism is a new and different avenue, our fight to protect individuals from the abridgement of their First Amendment rights will always continue and be at the forefront of what we do.”

*The American Jewish Congress is a membership association of Jewish Americans, organized to defend Jewish interests at home and abroad, through public policy advocacy, in the courts, Congress, the executive branch and state and local governments. It also works overseas with others who are similarly engaged.*

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LETTER FROM LYNNE E. BRADLEY, DIRECTOR, GOVERNMENT RELATIONS,  
THE AMERICAN LIBRARY ASSOCIATION (ALA)

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Office of Government  
Relations

# ALA American Library Association

June 30, 2008

Honorable Arlen Specter  
United States Senate  
Committee on the Judiciary  
711 Senate Office Building  
Washington, DC 20510

Honorable Joseph I. Lieberman  
United States Senate  
706 Hart Senate Office Building  
Washington, DC 20510

Dear Senator Specter and Senator Lieberman:

The American Library Association (ALA) supports S. 2977, the Free Speech Protection Act of 2008, and thanks both of you for introducing this important piece of legislation. ALA has been following the issue of "libel tourism" and welcomes this legislation offering appropriate United States venues for victims of foreign defamation litigation.

It is important that S. 2977, and its counterpart in the House of Representatives, H.R. 5814, be passed during this Congress, and ultimately become law. As you have well articulated in the "findings" to S. 2977, foreign "libel" lawsuits threaten authors, publishers, and our freedoms of speech and the press. Yet, through its chilling effect, such litigation also denies the American people the right to read and to access information – another inherent First Amendment right essential to our democratic form of government. Use of foreign courts to strip those in the United States from their First Amendment rights is extremely troubling.

The findings are carefully and comprehensively crafted to effectively explain the need and urgency for such legislation. We support the proposal to provide a domestic legal option for bringing action by an aggrieved author and others caught up in these foreign lawsuits. This bill would protect the rights of those against whom a "lawsuit for defamation is brought in a foreign country on the basis of the content of any writing, utterance, or other speech by that person that has been published, uttered, or otherwise disseminated in the United States may bring an action in a U.S. district court against any person who, or entity which, brought the foreign suit, if the writing, utterance, or other speech at issue in the foreign lawsuit does not constitute defamation under U.S. law." The proposal is realistic and provides a domestic alternative to fight "libel tourism" – really a form of "libel terrorism."

-2-

We stand ready to work with you on S. 2977 and commit our resources to help you obtain additional cosponsors as well as to generate grassroots lobbying support for final passage during this Congress. We will stay in contact with your offices to see how we can more specifically demonstrate our strong support for the "Free Speech Protection Act of 2008."

Sincerely yours,

Lynne E. Bradley, Director  
Government Relations

LETTER FROM PAUL B. JASKOT, CAA PRESIDENT AND PROFESSOR OF ART AND ART HISTORY, DEPAUL UNIVERSITY, AND LINDA DOWNS, EXECUTIVE DIRECTOR, THE COLLEGE ART ASSOCIATION (CAA)



February 10, 2009

The Honorable Peter King  
United States House of Representatives  
339 Cannon House Office Building  
Washington, DC 20510

re: The Free Speech Protection Act of 2009

Dear Mr. King:

We, on behalf of the College Art Association, write in support of the proposed Free Speech Protection Act of 2009 being introduced by you. College Art Association is a professional organization of over 16,000 members that represents the interests of scholars, authors, artists, libraries, museums, and other individuals and institutions who work in the arts in the United States. CAA publishes three scholarly journals, and supports the publication of books and other scholarship through grant programs, an annual conference, a website, and other activities. As a publisher, and with authors, artists, and scholars as its members, CAA urges that Congress enact into law the Free Speech Protection Act of 2009 expeditiously in this congressional session.

The United States is a beacon of free and open discourse. Our country produces some of the most widely respected and valued scholarship in the world, as well as some of the most influential art. Other countries and individuals worldwide look to us to set the highest standard for the free exchange of ideas, and our Constitution and Bill of Rights gives American scholars and artists the ability to meet that standard.

Now, as publishing becomes ever more globalized, American freedom to publish under United States law is threatened. Libel suits filed in foreign countries pose a grave danger to the free speech rights of American authors, journalists, publishers, and readers. The Free Speech Protection Act of 2009 provides authors and publishers with urgently needed protections. This is an excellent bill that could attract a broad bipartisan support. We must not allow the libel laws of other countries to undermine American laws or chill protected speech.

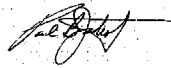
CAA concurs with the American Association of University Professors, American Booksellers Foundation for Free Expression, American Library Association, American Society of Newspaper Editors, Association of American Publishers, Association of American University Presses, the National Coalition Against Censorship, PEN American Center, and others, who wrote to you on September 10, 2008, stating: "Increasingly in recent years, individuals who challenge the accuracy of published materials have attempted to strike back at their authors by filing lawsuits in foreign countries, most

commonly England. U.S. law requires the party alleging libel to prove that the statements objected to are actually false. To avoid this burden, libel plaintiffs have engaged in forum shopping—filing lawsuits in countries with either different burdens of proof or different definitions of libel or both.”

The Free Speech Protection Act of 2009 is modeled on the recent New York state law that broadens the jurisdiction of New York courts to ensure that foreign libel judgments not be enforced unless they meet New York and U.S. constitutional standards. The Free Speech Protection Act of 2009 adds further force to this excellent law by authorizing authors to countersue foreign plaintiffs in a U.S. court for damages of up to three times the amount of the foreign judgment if the foreign plaintiff acted to suppress the speech of the U.S. person.

Passage of the Free Speech Protection Act of 2009 is essential to ensure that weaker protections for free speech in other countries do not undermine our fundamental First Amendment freedoms.

Yours sincerely,



Paul B. Jaskot,  
CAA President and Professor of Art and Art History,  
DePaul University



Linda Downs,  
Executive Director

## PREPARED STATEMENT OF VARIOUS ORGANIZATIONS

**Statement in Support of the Free Speech Protection Act of 2008 (S. 2977)**

The undersigned organizations express their strong support for the Free Speech Protection Act of 2008 (S. 2977). Libel suits filed in foreign countries pose a grave danger to the free speech rights of American authors, journalists, publishers, and readers. S. 2977 provides authors with weapons to protect their right to express themselves freely and helps ensure that the libel laws of countries that provide less protection for free speech will not undermine American laws or chill protected speech.

Increasingly in recent years, individuals who challenge the accuracy of published materials have attempted to strike back at their authors by filing lawsuits in foreign countries, most commonly England. U.S. law requires the party alleging libel to prove that the statements objected to are actually false. To avoid this burden, libel plaintiffs have engaged in forum shopping – filing lawsuits in countries with either different burdens of proof or different definitions of libel or both.

The most notorious recent example of this libel tourism is the lawsuit filed by Saudi billionaire Khalid Salim bin Mahfouz, who sued Dr. Rachel Ehrenfeld, an American expert on terrorism, over statements in her book, *Funding Evil: How Terrorism Is Financed and How to Stop It*. Despite the fact that the book was never published in England and that a mere 23 copies had been sold there by online booksellers, Bin Mahfouz brought suit in an English court. Under British law, the burden of proof in the first instance is on the *defendant* to prove the truth of any allegedly libelous statement. Faced with the prospect of enormous legal costs to meet this burden, and objecting as a matter of principle to having to litigate in England without having published her work there, Ehrenfeld refused to defend the suit. The English court entered a default judgment, enjoined further distribution of the book in the United Kingdom, and awarded substantial damages and legal fees.

Bin Mahfouz's English lawsuit had the predictable effect of chilling Ehrenfeld's free speech rights and effectively silencing anyone who might consider publishing similar statements. It sent the message that he is willing and able to challenge any investigation of his family's and the Saudi royal family's alleged ties to the funding of terrorism. He has refused to disclaim an intention to enforce the judgment in the United States, further reinforcing its chilling effect.

New York has passed a law that broadens the jurisdiction of New York courts over such cases to ensure that foreign libel judgments not be enforced unless they meet New York and U.S. constitutional standards. S. 2977 is modeled on the New York law. It provides that foreign libel judgments cannot be enforced in the United States if the speech is not actionable under U.S. law. S. 2977 also authorizes authors to countersue the foreign plaintiffs in a U.S. court for

damages of  
up to three times the amount of the foreign judgment if the foreign plaintiff acted to suppress the  
speech of the U.S. person.

We believe that passage of the Free Speech Protection Act is essential to protect the right  
of American authors to investigate and reveal wrongdoing anywhere in the world and to ensure  
that weaker protections for free speech elsewhere do not undermine First Amendment freedoms  
at home.

American Association of University Professors  
American Booksellers Foundation for Free Expression  
American Independent Writers  
American Library Association  
American Society of Newspaper Editors  
Association of American Publishers  
Association of American University Presses  
The Defending Dissent Foundation  
DKT International  
Entertainment Consumers Association  
Freedom to Read Foundation  
Independent Book Publishers Association  
National Coalition Against Censorship  
New York Center for Independent Publishing  
Online Policy Group  
Peacefire  
PEN American Center  
Reporters Without Borders  
Woodhull Freedom Foundation





ARTICLE ENTITLED "IT TAKES THE MARKETPLACE OF IDEAS TO WIN THE WAR OF IDEAS," BY ANDREW C. MCCARTHY

## It Takes the Marketplace of Ideas to Win the War of Ideas

By Andrew C. McCarthy

Fifteen years ago, in February 1993, radical Islam brought its global war to our shores by bombing the World Trade Center.

During the Age of Jihad that has enveloped us ever since, the American judicial system has a troubled record when it comes to safeguarding the American people.

To know that this is so, we New Yorkers need look no further than the crater where the Twin Towers once stood. About six blocks away from Ground Zero is the storied Foley Square federal courthouse. That is the battlefield on which we chose to confront the enemy through the eight tumultuous years when prosecution in the judicial system was the essence of our national counterterrorism strategy.

The result? Less than three dozen mostly low-level jihadists neutralized, a provocatively weak response that can only have encouraged the series of audacious attacks that culminated in 9/11.

For our jihadist enemies, by contrast, our courts have proved extraordinarily effective.

The Supreme Court has repeatedly accommodated requests that it supplant the political branches in the quintessentially political act of conducting war.

Just since 2004, the justices have seized jurisdiction over wartime detainees, nullified the centuries old power of the president to convene military commissions, and effectively rewritten the Geneva Conventions into a terrorist-friendly, judicially enforceable treaty.

In a few short weeks, the justices will decide whether to grant alien enemy combatants American constitutional rights. The lower courts, meanwhile, have called into doubt governmental surveillance authority and even the commander-in-chief's power to determine what the battlefield is— while the enemy claims the power to attack anyone, anyplace, at any time.

To say the least, "lawfare" has left our body politic more the *victim* than the beneficiary of our system's reserves of due process and veneration of individual rights.

Where free speech is concerned, it's an especially insidious phenomenon. Mark Steyn and Ezra Levant are trenchant discussing the official shenanigans of governmental bodies that suppress free speech under the guise of policing "hatred."

Perhaps more insidious are the accounts many of our panelists provide about the *unofficial* infiltration by jihadist sympathizers into the highest reaches of government.

The agenda is relentless, if not always obvious. They seek to quell dissent from the party line not by formally destroying freedom of speech (the First Amendment, after all, is still on the books). More fundamentally, the suppression proceeds by shaping the choosing mentalities and narrowing the list of acceptable attitudes and acceptable topics of study.

To function properly and persevere, free societies are dependent on what Justice Holmes famously described as the “marketplace of ideas.” Free exchange. The conceit that the sunshine of examination— not suppression— is the best disinfectant.

Well, the “war on terror” is a war driven by an ideology.

Even though we recoil from naming that ideology, we are repeatedly reminded that the “war of ideas” will be every bit as dispositive as the war on the battlefield.

If that is the case, then as ideas go, the war must embrace the marketplace.

That is the challenge posed by libel tourism. Will our First Amendment marketplace be unleashed in the battle of ideas? Or will we unilaterally disarm?

\* \* \*

In considering potential legal responses to libel tourism’s suppression of speech, we must of course realize that it is a phenomenon of the international arena.

Libel tourism involves forum-shopping order to bring lawsuits in a country that meets two criteria:

First, its defamation laws are skewed in favor *not* of the *journalist* (who is favored by American law) but of the journalist’s *subject* (who is usually a public figure).

Second, its adjudications are accorded international respect.

The British courts fit the bill. We would not be having a conference today if Sheikh Khalid bin Mahfouz and others like him were demanding justice in Sierra Leone.

The international realm generally implicates *diplomacy*, not judicial processes. Law has its severe limits when nearly 200 nations assert the right to enforce their own rules.

Transnational progressives envision a post-sovereign order guided by universal standards divined by international law professors and supra-national bureaucrats. Thankfully, the world we actually inhabit is still premised on comity between sovereigns, who are owed deference in their own jurisdictions.

Just two weeks ago, in a case called *Medellin v. Texas*, the Supreme Court reminded us of law’s limits on the international stage.

In rejecting an effort by the UN’s International Court of Justice to dictate to American state courts on death penalty procedures, Chief Justice John Roberts reaffirmed first principles:

“The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative— ‘the political’— Departments.” It is in the *political realm*, he elaborated, that “sensitive foreign policy decisions” are to be made; they are not to be “transferred to state and federal courts” unless the political branches clearly provide for court intervention.

We lawyers can chatter 'til we're blue in the face about legislation. But let us be frank. Libel tourism would not be a problem if our political policy makers were offended by it.

Right after 9/11, in the fleeting with-us-or-against-us heyday, President Bush boldly threatened to treat terror-sponsoring regimes as the equivalent of terrorist organizations. One might have hoped that would mean: clear-eyed recognition of the nexus between Saudi Wahhabism and the rampage wrought by al Qaeda.

One might have hoped for relentless pressure to force the Saudi regime to change its ways, not least by promoting efforts to expose Saudi facilitation of jihadism—sunlight, after all, being the best disinfectant.

Instead, our Saudi policy is more like, “You’re with us or against us, whatever you like.”

We officially regard the Saudis as “key allies” in the war on terror, even as we acquiesce in their zealous exportation of a triumphalist hate ideology.

All in all, it is part of a determination (shared by administrations of both parties) to elide the “Islamic” in Islamic terror, to portray jihadists as imposters who have perverted the real Islam, and to insist that Muslim belligerents are really animated by poverty, ancient grievances, lack of democracy—anything but scriptural commands to quell non-believers.

The conclusion is unavoidable: our government has been far from exercised over the silencing of an inconvenient truth. Were that not the case, diplomacy could have ended this problem. The U.S. has many diplomatic avenues and pressure-points for influencing Saudi and British policy. If moved to do so, the British Parliament could stanch libel tourism tomorrow by heightening the flimsy jurisdictional threshold that gives non-Britons access to the U.K.’s courts on based on such gossamer as the online purchase of a mere 23 copies a book.

Here, it is worth pausing to give our British friends credit where credit is due. Until very recently, the most positive legal developments regarding libel tourism have occurred on the other side of the pond.

In the groundbreaking 2006 case of *Jarrod v. Wall Street Journal Europe*, the Law Lords brought British defamation law much closer to American standards.

British law has always put the onus on journalists to prove the truth of their assertions. This is a stark contrast from American First Amendment jurisprudence, which imposes on a public figure the weighty burden of proving that a journalist’s assertions are not merely false but maliciously or recklessly so.

In the inevitable clash of values, the American theory elevates a functioning democratic society’s interest in being fully informed about matters of public concern over the individual’s interest in protecting his reputation.

It conveys a practical understanding that many things which are true cannot be proved to the satisfaction of courtroom evidentiary standards: knowledgeable sources often insist on confidentiality for fear of reprisal or embarrassment; government has been known to conceal its

misdeeds under the carapace of “classified information,” dispiriting potential whistleblowers with the prospect of prosecution.

The *Jarvel* case does not fully align British libel law with its American counterpart. It does, however, make positive strides in that direction.

It creates a “qualified privilege” for establishment journalists accused of publishing falsehoods. They must be able to satisfy the court that they have reported on matters truly *in the public interest* and that the reporting has been done *responsibly*.

This is a Brave New World for the U.K. We need to watch closely for clarification about:

Who is a *journalist*?

What is in the *public interest*?

What is *responsible* journalism?

But *Jarvel* is very encouraging. Writing in the Weekly Standard, Stephen Schwartz sounded an optimistic note: “The action of the Law Lords may also express the strengthened will of an important section of the English political and legal establishment to remove the protections Saudis have long enjoyed in the United Kingdom.”

We can hope he’s right, yet still realize it is past time to remove those protections in the United States as well.

Without prospects for diplomatic breakthroughs, I think that means legislation.

Here, I believe I part company with our colleague John Walsh, who worries in a thoughtful *New York Law Journal* essay, “The Myth of Libel Tourism,” that our concerns are overwrought—or at least not sensitive enough to competing interests.

Our British allies, he rightly observes, have a venerable legal system, forefather of our own.

Dr. Ehrenfeld could have responded to Sheikh Mahfouz’s British libel suit. Had she done so, he maintains, she’d have had a meaningful opportunity to “back up her charge of terrorism support”—a burden the *Jarvel* case has theoretically made easier to carry.

It is not unusual to hear such objections from lawyers. For us, litigation is as natural as breathing—and maybe even more desirable. But we tend to overlook that, for most everyone else, litigation is incredibly time-consuming, burdensome and expensive.

Dr. Ehrenfeld is no bad actor. She was contributing to our vaunted marketplace. She was engaged in First Amendment-protected activity when *Funding Evil* was originally published in 2003. Publication was in New York, where she lives and works. She and her publisher made no attempt to market the book in England.

And when Sheikh Mahfouz chose to file his lawsuit, *Jarvel* was not yet the law of England.

Had she chosen to defend the suit, Dr. Ehrenfeld thus faced the prospect of expending several years and hundreds of thousands of dollars litigating in a foreign country, thousands of miles from home, where she had not sought to publish her claims.

And in the U.K., she was likely to lose, not because she was wrong, much less malicious; not because she was uttering words of no public concern or intended cause harm.

She was likely to lose because many of her assertions stem from reputable public synopses of classified information, testimony about which she is not in a position to compel.

Note that Richard Clarke, formerly the top counterterrorism official in the Clinton administration, told the Senate Banking Committee in 2003 that Sheikh bin Mahfouz had transferred \$3 million to Osama bin Laden through an organization the Treasury Department has described as an al-Qaeda front.

Congress can make that kind of testimony happen. Rachel Ehrenfeld can't.

Congress can demand information from current and former government officials. It can retreat to "closed session" if top-secret corroboration is called for.

A private civil litigant can't—not even in American courts, much less in the public courts of a foreign country.

But there's a more important point. Quite apart from Dr. Ehrenfeld's *personal* interests, the subject matter of her research and writing implicated the highest *public* interest: the financial support systems enjoyed by terror networks that target Americans for mass-murder.

The signal issue is not whether Dr. Ehrenfeld could have defended herself. It is whether she should have had to.

If such lawsuits are permitted, journalists will not write about the central national-security challenges of our time.

If some intrepid few do try to take the plunge, they cannot reasonably expect that corporate publishers or research-sponsoring foundations will freely plunge along with them. There are shareholders and donors to answer to. Publishers and foundation have the deeper pockets. For the libel tourist, they are the likelier and more significant targets.

In that atmosphere, such crucial stories as Saudi underwriting of Islamic terror will not be told. Sure, the First Amendment will still be on the books, but the enemy's enablers will have succeeded in shaping our minds and narrowing our fields of legitimate inquiry. They will have determined what we get to talk about.

And there is an irony here that should be intolerable. All these consequences would flow from a transparent scheme to skew public opinion by intimidation.

This is all about scaring off publishers and discouraging scholarly inquiry. The *Ehrenfeld* case proves it.

The Saudi Sheikh went to a British court to obtain a judgment against an American that he had absolutely no intention of ever collecting on.

The judgment amount, \$225,000, might be substantial for Dr. Ehrenfeld, but it's chump change for Sheikh Mahfouz, whose personal worth has been estimated at \$3.2 billion.

The U.S. was the only place he could collect on the judgment, but it wasn't worth the trouble. Dr. Ehrenfeld dared him to try by filing a responsive American suit, seeking a judicial declaration that the First Amendment would be violated by any attempt to collect on the British judgment.

His reaction? He fought tooth and nail to avoid American justice.

To flip around John Walsh's contention, Mahfouz thumbed his nose at the U.S. court system, even though it would have provided him with a meaningful opportunity to refute Dr. Ehrenfeld's claims.

To execute on the judgment, he would have to subject himself to the jurisdiction of U.S. courts. That is the very thing he has most energetically refrained from doing—a well-considered strategy that resulted in the conclusion of American courts to dismiss Dr. Ehrenfeld's suit on the ground that there is, as of now, no legal basis to assert jurisdiction over him.

In sum, Sheikh Mahfouz wants to *have* the British judgment, not *act on* it. His concern is not Dr. Ehrenfeld's purported slights. What he wants is the *intimidation effect* the British default judgment has on potential publishers and backers of Dr. Ehrenfeld and others like her: the warning it conveys about the wages of exposing information about Saudi terror sponsorship: vexatious litigation and its mountainous costs.

\* \* \*

Recognizing this trend, many American states have enacted so-called anti-SLAPP laws, which were described by Brooke Goldstein during this morning's first panel. The acronym is for "strategic lawsuit against public participation." SLAPP directs itself against lawsuits, like Sheikh Mahfouz's, that are filed primarily to harass those who seek to address matters of public concern. It permits the defendant to submit a pre-discovery defense that the lawsuit is frivolous—the court can dismiss it on those grounds because the journalist has acted in good faith and without no malicious intent.

In a recent example of its usefulness, Yale University Press and Matthew Levitt of the Washington Institute for Near East Policy filed an anti-SLAPP motion against a Muslim "charitable" organization called Kinder-USA. Yale had published Dr. Levitt's book, *Hamas—Politics, Charity and Terrorism in the Service of Jihad*, which, based on exacting research, documented the inextricable ties between the Palestinian terror organization's ostensibly charitable fund-raising and its savagery.

Kinder-USA was one of the charities implicated. Hamas being a longtime recipient of Saudi largesse, it is little surprise that Kinder-USA emulated the Mahfouz practice of suing the author, his research institute, and the publisher. It tried to do so, however, in the United States—specifically, in California, home of the original SLAPP legislation. The defendants responded with the anti-SLAPP motion. Faced with the prospect of having its frivolous suit tossed and being ordered to pay the legal fees of those it had sought to intimidate, Kinder-USA folded, dismissing its suit in August 2007.

Unfortunately, SLAPP is useless against the libel tourist, who lodges his claims before foreign tribunals. Back in England, American SLAPP laws were of no avail to Rachel Ehrenfeld. Similarly, they provided no comfort for Cambridge University Press, which cravenly caved in to Sheikh Mahfouz's tactics.

Cambridge not only of paid a settlement and issued a gushing apology for its publication of *Alms for Jihad*. As Stanley Kurtz recounted during our first panel this morning, in the worst book-burning tradition, Cambridge actually recalled already distributed copies and pulped the entire unsold lot.

And for those who point to the Law Lords' *Jameel* decision and contend that the United States need take not action against libel tourism because all is now well in England, *Alms for Jihad* stands as a cautionary tale: The book was published (at least fleetingly) the same year *Jameel* was decided—2006. Yet, Cambridge's total surrender occurred in 2007, the following year. Clearly, despite *Jameel*, the publisher was still confronted by the prospect of lengthy, expensive litigation and took the path of least resistance.

We need an American legislative response, for two primary reasons.

First, in the United States, the libel tourist will lose—and he deserves to lose.

Second, and relatedly, as plaintiffs, researchers like Dr. Ehrenfeld would be unleashed—by the generous discovery permitted in our civil litigation—to conduct an extensive probe of the finances and terror connections of the likes of Sheikh Mahfouz.

As already noted, the New York State legislature has recently taken action. At the end of March 2008, it passed the “Libel Terrorism [sic] Protection Act.” If signed by Governor Patterson, this bipartisan legislation would effectively reverse the result of Dr. Ehrenfeld's suit. Henceforth, New York courts, and federal courts applying New York law, would have jurisdiction in a case where (a) an alleged libel was published in New York; (b) the author (or her sponsors or publisher) are New Yorkers or, at least, have property in the state which could potentially be executed against to satisfy a foreign judgment; and (c) a foreign judgment has been obtained in a jurisdiction which, in the view of the New York judge, did not provide “at least as much protection for free speech and the press” as is provided by the Constitutions of the United States and the State of New York.

Naturally, critics complain that such legislation is an instance of forcing American standards on foreign countries, an unwarranted departure from the deference we owe other sovereigns within their jurisdictions. But this is hardly the case. The proposed law narrowly directs itself to alleged defamations *published in New York*. It does not, and indeed could not, compel other nations to adopt the press-friendly standards of *New York Times v. Sullivan*. It does not and could not stop a libel tourist like Sheikh Mahfouz from continuing to trawl the planet for hospitable legal climes. Instead, it recognizes that foreign actors are aggressively seeking to *deny Americans* the *deference owed to our own sovereignty* regarding actions taken *within our own jurisdiction*. In a healthy departure from the modern currents of lawfare, it arms *Americans* with legal tools to stave off the assault—a development that has the residual and all-important benefit of promoting the free exchange of information that is vital to good public policy.

The most persuasive criticism of the New York bill is that it is not enough—through no fault of New York lawmakers. New York City is an international media and book-publishing hub, and it

may be that the state's legislation will provide the tonic necessary to invigorate the First Amendment against most attacks. But it won't suffice against all of them.

It is, more to the point, an *American* freedom we are talking about, not merely one vouchsafed by New York's Constitution.

It is the national government's first responsibility to protect the federally guaranteed rights of the governed— and one would hope it would do so with at least as much verve as has animated it to provide, say, judicial review for alien terrorists captured by our military while making war on the American people. Libel tourism represents a challenge to a fundamental right of *our* citizens, a freedom on which the functioning of our democracy depends.

Congress should craft an anti-libel-tourism statute creating a federal cause of action for American journalists, and their publishers and sponsors, who are sued in foreign defamation actions based on the U.S. publication of allegedly libelous claims. The statute should provide for expedited discovery, as well as damages and costs commensurate with the foreign judgment and expenditures.

It should, in fact, go further. In its preliminary ruling last summer in *Ehrenfeld v. Mahfouz*, the U.S. Court of Appeals for the Second Circuit took notice of Dr. Ehrenfeld's contention that Mahfouz had engaged in a scheme designed to undermine Ehrenfeld's ability to conduct research and write for publication. As part of the new cause of action, Congress should empower a court to impose double or treble damages if such a scheme is proved by a preponderance of the evidence.

To date, no federal legislation has been proposed, though Rep. Peter T. King of New York (the ranking Republican on the House Homeland Security Committee) is actively engaged in the issue and considering the introduction of a bill. Action is sorely needed. Unlike most legislation, a provision to combat libel tourism would actually result in a *reduction* of litigation. Aware that their tactics are no longer cost-free, Sheik Mahfouz and others would be far less likely to launch foreign suits, obviating any need by American journalists to file responsive actions. Truly irresponsible journalists who publish malicious falsehoods would still be liable under American and foreign law—the new legislation would protect only writers and publishers who adhere to standards of professionalism.

The national government, however, would have reaffirmed the centrality of free-expression, the supremacy of American sovereignty over actions taken within our realm, and the commitment to protect Americans by law. Of perhaps greater significance, in the struggle against jihadism that is the central challenge of our time, a libel tourism law would revitalize the national purpose to defeat our enemies just as decisively in the war of ideas as in the war on the battlefield.





NEW YORK POST ARTICLE ENTITLED "RACHEL'S LAW,"  
BY SAMUEL A. ABADY AND HARVEY SILVERGLATE

Page 1 of 2

# NEW YORK POST

## RACHEL'S LAW

By SAMUEL A. ABADY &amp; HARVEY SILVERGLATE



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February 25, 2008 — A CRITICAL First Amendment bill, the "Libel Terrorism Reform Act" is pending in both houses of the state Legislature. It was written in direct response to the Court of Appeals' decision in the case of Ehrenfeld v. bin Mahfouz.

Rachel Ehrenfeld is an Israeli-American terrorism scholar and internationally recognized counterterrorism expert. In her book "Funding Evil: How Terrorism Is Financed and How to Stop It," she identified Khalid bin Mahfouz, banker to the Saudi royal family and one of the world's richest men, as a leading terrorism financier.

Ehrenfeld cites government documents as evidence for these particulars:

\* As far back as 1996, French, British and US intelligence believed bin Mahfouz had erected a banking system to benefit Osama bin Laden.

\* Bin Mahfouz's bogus Muwafaq (Blessed Relief) "charitable foundation" fronted for several other terror groups, including Makhtab al-Khidamat, al Qaeda, Hamas and Abu-Sayyaf. The "charity's" head was Yassin al-Qadi, later designated by the State and Treasury Departments as an international terrorist.

Bin Mahfouz responded by suing Ehrenfeld for libel - but not in New York, even though "Funding Evil" was published here. He sued in *England*, where libel law places the burden of proof on defendants, rather than on plaintiffs. The English court accepted jurisdiction on the dubious grounds that 23 copies of Ehrenfeld's book had been bought there via the Internet.

In a US court, bin Mahfouz would be forced to open his finances to scrutiny and be deposed under oath - neither of which he had to do when suing in England.

Britain has no First Amendment to protect free speech or a free press - and it has recently seen a surge in "libel tourism" - actions by wealthy, nonresident Arabs linked to terrorism who sue in England because its law strongly favors libel plaintiffs.

Last year, English legal publisher Sweet and Maxwell reported that the number of such libel cases *tripled* from the year before to 13 percent of all defamation cases in Britain.

Libel tourism has forced British publishers to pulp (that is, destroy unsold) five books on terrorism, and libel fears led Random House UK to drop plans to publish Craig Unger's US bestseller, "House of Bush, House of Saud."

Ehrenfeld refused to fight bin Mahfouz in British courts; he obtained a default judgment that ordered her

to destroy all copies of "Funding Evil" and pay him \$225,000 in damages.

Normally, such foreign judgments are enforceable in the United States under the legal doctrine of "comity." But Ehrenfeld sued bin Mahfouz in Manhattan federal court seeking an up-front declaration that his English libel judgment violates the First Amendment and is void here.

Unfortunately, the federal court dismissed her case, ruling that bin Mahfouz lacked sufficient New York contacts for it to assert jurisdiction over him.

She appealed - but the jurisdictional issue is a matter of state law, so the federal court sent the case to New York's Court of Appeals. On Dec. 20, that court confirmed the original "no jurisdiction" finding - completely skirting the critical First Amendment issues.

But the court signaled a remedy - noting the jurisdictional issue "should be directed to the Legislature."

In response, Assemblyman Rory Lancman (D-Queens) and Sen. Dean Skelos (R-LI) introduced the bipartisan "Libel Terrorism Reform Act" to create the jurisdictional reach the Court of Appeals found lacking.

Their bill would empower New York courts to assert jurisdiction over anyone who obtains a foreign libel judgment against a New York publisher or writer - and limit enforcement to those judgments that satisfy "the freedom of speech and press protections guaranteed by both the United States and New York Constitutions."

In effect, this renders all foreign libel judgments unenforceable in New York, as no court outside the United States abides by our First Amendment protections.

But this bill, if it becomes law, will do more than protect our precious First Amendment freedoms in New York. It also will serve as a template for action by Congress - and attract foreign counterterrorism scholars and journalists to our shores.

Americans certainly differ about how to fight terrorism but can all agree that we can't protect our way of life without a free press. As Rory Lancman put it: "The ability of our journalists, authors and press to expose . . . the truth is the most important weapon we have in the War on Terror."

*Samuel A. Abady practiced criminal-defense and civil-rights law for 25 years. Harvey Silverglate is a criminal-defense and civil-liberties lawyer in Boston.*

**Home**

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NEW YORK TIMES ARTICLE ENTITLED “‘LIBEL TOURISM’: WHEN FREEDOM OF SPEECH TAKES A HOLIDAY,” BY ADAM COHEN

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EDITORIAL OBSERVER

## ‘Libel Tourism’: When Freedom of Speech Takes a Holiday

By ADAM COHEN

When Rachel Ehrenfeld wrote “Funding Evil: How Terrorism Is Financed and How to Stop It,” she assumed she would be protected by the First Amendment. She was, in the United States. But a wealthy Saudi businessman she accused in the book of being a funder of terrorism, Khalid bin Mahfouz, sued in Britain, where the libel laws are heavily weighted against journalists, and won a sizable amount of money.

The lawsuit is a case of what legal experts are calling “libel tourism.” Ms. Ehrenfeld is an American, and “Funding Evil” was never published in Britain. But at least 23 copies of the book were sold online, opening the door for the lawsuit. When Ms. Ehrenfeld decided not to defend the suit in Britain, Mr. bin Mahfouz won a default judgment and is now free to sue to collect in the United States.

The upshot is a First Amendment loophole. In the Internet age, almost every American book can be bought in Britain. That means American authors are subject to being sued under British libel law, which in some cases puts the initial burden on the defendant to prove the truth of what she has written. British libel law is so tilted against writers that the United Nations Human Rights Committee criticized it last month for discouraging discussion of important matters of public interest.

Mr. bin Mahfouz, who has denied financing terrorism, said Ms. Ehrenfeld’s book contained inaccuracies and demanded a retraction. He also demanded a significant contribution to a charity of his choice — a charity Ms. Ehrenfeld said she feared would be one with ties to terrorism. Ms. Ehrenfeld, who describes herself as being “in the business of stopping people who fund terrorism,” refused to back down. “I said,” she later recalled, “he’s found the wrong victim.”

Ms. Ehrenfeld rallied prominent champions of free speech to her cause, including the American Library Association, the Association of American Publishers and the PEN American Center. She also set to work trying to change American law. The New York State Legislature passed a bill that some are calling “Rachel’s law,” which blocks enforcement of libel judgments from countries that provide less free-speech protection than the United States. Gov. David Paterson signed it on May 1.

A similar, bipartisan bill has been introduced in Congress. The federal bill would extend protection to the entire country. It would also allow American authors and publishers to countersue, and if a jury found that the foreign suit was an attempt to suppress protected speech, it could award treble damages. There is little opposition to it — and Congress should pass it before it adjourns later this month.

“Libel tourism” is a threat to America’s robust free-speech traditions, which protect authors here. If foreign libel judgments can be enforced in American courts, there will be a “race to the bottom”; writers will only have as much protection as the least pro-free-speech nations allow.

Editorial Observer - 'Libel Tourism' - When Freedom of Speech Takes... [http://www.nytimes.com/2008/09/15/opinion/15mon4.html?\\_r=1&pa...](http://www.nytimes.com/2008/09/15/opinion/15mon4.html?_r=1&pa...)

Most writers, particularly those who concern themselves with arcane subjects like terrorism financing, are not wealthy. The prospect of a deep-pocketed plaintiff coming after them in court can be frightening. Even if the lawsuit fails, the cost and effort involved in defending against it can be considerable.

The result is what lawyers call a "chilling effect" — authors and publishers may avoid taking on some subjects, or challenging powerful interests. That has already been happening in Britain. Craig Unger's "House of Bush, House of Saud: The Secret Relationship Between the World's Two Most Powerful Dynasties" was a best seller in the United States. But its British publisher canceled plans to publish the book, reportedly out of fear of being sued. (A smaller publisher later released it.)

Ms. Ehrenfeld says that even in the United States, writers and publishers have been backing away from books about terrorism financing — particularly about the Saudi connection — out of fear of being sued. It is hard to know if other books are not being written out of fear of lawsuits — that is the essence of the chilling effect.

Britain should rethink its libel laws, as the U.N. committee urged, for the sake of its citizens. But until it does, the United States should ensure that other countries' pro-plaintiff libel laws do not infect this country and diminish our proud tradition of freedom of expression.

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THE WASHINGTON TIMES EDITORIAL

By

May 11, 2008

THE WASHINGTON TIMES EDITORIAL - One of the most powerful weapons Islamists have is the threat to use the courts to silence people who get in their way. That's why it was so heartening to learn that on April 30, New York Gov. David Patterson signed into law the Libel Terrorism Protection Act, which is critically important in protecting the First Amendment rights of persons who report factually about terrorism. The legislation is commonly referred to as "Rachel's Law," named after Rachel Ehrenfeld, director of the New York-based American Center for Democracy. Miss Ehrenfeld, a scholar who has dedicated her professional life to the study of terrorism, ran afoul of Saudi billionaire Khalid Salim bin Mahfouz. Miss Ehrenfeld (who has been published numerous times in this newspaper) wrote in her book "Funding Evil" that Mr. bin Mahfouz was involved in financing Hamas and al Qaeda; Mr. bin Mahfouz denied that he had knowingly donated to either group.

Instead of suing Miss Ehrenfeld in the United States, where she lives and publishes her work, Mr. bin Mahfouz sued in Britain. Neither Mr. bin Mahfouz nor Miss Ehrenfeld live there, but it is much easier to prove libel there than in the United States because British law places the burden of proof on the defendant rather than the plaintiff. That's why people known as "libel tourists" look for the smallest connection to Britain in order to obtain a pretext to file suit there. In this case, Mr. bin Mahfouz cited the fact that a small number of copies of her work had been purchased in Britain using Amazon.com, and the fact that a chapter of the book appeared on the Internet where it may have been seen by British readers. In May 2005, a British judge ruled that Miss Ehrenfeld must apologize to Mr. bin Mahfouz, pay more than \$225,000 and destroy copies of her book. It would be difficult to imagine a ruling more detrimental to the First Amendment.

But Miss Ehrenfeld is nothing if not a fighter, so she sought relief from the ruling in state and federal courts in the United States — with mixed results. In one case, New York state's highest court ruled that it could not protect Miss Ehrenfeld from Mr. bin Mahfouz's British lawsuit judgement. But Miss Ehrenfeld won a victory in the 2nd Circuit U.S. Court of Appeals on June 8, 2007, when the court ruled that her case against Mr. Mahfouz's libel verdict was valid and that she could appeal to relief from American courts in order to stop the British court verdict from being enforced here. Lost in the libel debate was the revelation last summer (reported on this newspaper's Op-Ed page last year by Jihad Watch director Robert Spencer), that a September 13, 2001, note from France's foreign intelligence agency said that in 1996 Mr. bin Mahfouz was one of the architects of a banking scheme constructed for the benefit of Osama bin Laden — a point that makes the British libel verdict against Miss Ehrenfeld appear even more ridiculous.

Rachel's Law would declare overseas defamation judgements unenforceable in New York courts unless the foreign defamation laws provide the same guarantees provided pursuant to the U.S. Constitution. "New Yorkers must be able to speak out on issues of public concern without living in fear that they will be sued outside the United States, under legal standards inconsistent with our First Amendment rights," Mr. Patterson said in signing the legislation into law. Last week, Sens. Joseph Lieberman, Connecticut Democrat, and Arlen Specter, Pennsylvania Republican, along with Rep. Peter King, New York Republican, introduced legislation that would in essence extend "Rachel's Law" protections to residents of all 50 states. That's something Congress should begin carefully considering right away.

PREPARED STATEMENT OF PAUL ALAN LEVY, PUBLIC CITIZEN LITIGATION GROUP,  
PUBLIC CITIZEN



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STATEMENT OF PUBLIC CITIZEN  
ABOUT PROPOSED LEGISLATION  
TO PROTECT AMERICANS FROM  
JUDGMENTS IN FOREIGN COURTS  
THAT DISREGARD FREE SPEECH PROTECTIONS

Submitted to the  
Subcommittee on Commercial and Administrative Law  
Committee on the Judiciary

for its  
Hearing on Libel Tourism  
February 12, 2009

Paul Alan Levy

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February 23, 2009

Public Citizen thanks the Subcommittee and Chairman Cohen for holding a hearing to solicit public input about both the problems caused by libel tourism and the best possible legislative solutions. We agree generally with the testimony provided by all four witnesses who agreed, albeit from slightly different perspectives, that libel tourism is a problem worth addressing. We also agree with the position endorsed by all of the witnesses that national legislation is needed to declare a public policy against the enforcement of such judgments in the United States, and thus avoid the need to establish such a public policy through common law development in the courts, or through legislation in each of the fifty states. Last year H.R. 6146 was passed in the House and we hope that, this year, a similar bill can be enacted into law.

However, last year's bill did not address a common libel tourism problem that arises in free speech litigation in the Internet context and that, we hope, can be fixed by a modest change. I am attaching a letter that illustrates the problem. It responds to a threat to file a libel suit in England against a fairly large Internet Service Provider ("ISP") based in the Dallas area because of criticisms of a cell phone telemarketing company that appeared on a message board hosted by the ISP's customer, North Carolina resident Julia Forte.

Ms. Forte is a client whom Public Citizen has been advising for about a year

on issues that arise from consumer criticisms of companies on a pair of web sites that she operates about telemarketers. Her web sites appear at [www.800notes.com](http://www.800notes.com) and [www.whocallsme.com](http://www.whocallsme.com). The theory of her sites is that when a consumer gets a call from an 800 number (or some other number) that she does not recognize, the consumer can go to Forte's web sites to see what others are saying about what the calls are about. The comments are organized, not by the name of the telemarketing company, but rather by the telephone number that the company uses. And, if the consumer does not find any previous comments for that number, she can begin a page for comments about that number, and leave comments about her own experience to begin the discussion. In several cases, an interactive discussion about experiences with the company ensues. All these postings can be made free of charge, and the company can respond to criticisms through free postings as well. We consider the message boards to be a useful consumer service as well as an outlet for discussion about telemarketers.

From time to time, Ms. Forte receives complaints about some of the comments posted on the message boards. She addresses these complaints on a case-by-case basis. Sometimes she concludes that the better solution is for the company to respond to the criticisms, and sometimes she concludes that one or more comments should be



removed. Under the Communications Decency Act, 47 U.S.C. § 230, the operator of a message board is immune from suit over comments posted by consumers on the message board; the operator is similarly immune from suit by any posters who are unhappy about the removal of their comments. Occasionally, instead of politely requesting removal of specific postings, with an explanation about why they ought to be removed, companies threaten to sue Forte herself for the content of the messages. In response, she explains her statutory immunity and that is generally the end of the matter.

Last year, Forte was sued in Canada by a company whose telephone number is discussed on her web sites. However, Ms. Forte, who is not subject to suit in Canada, would enjoy no statutory immunity under Canadian law, and so she has declined to appear there. Despite repeated efforts to intimidate her into hiring a lawyer to defend against the suit in Canada — most recently, she received a visit from a private investigator who harangued her about her obligation to go to Canada to defend the lawsuit there — she is waiting for the issuance of a Canadian judgment and plans to defend against an effort to enforce any judgment in the United States.

The most recent situation (reflected in the accompanying letter) takes the

problem a step further and reveals how serious the impact of threats to file suit can be in the online free content. Those who want to suppress free speech know very well how sensitive Internet Service Providers are to the prospect of litigation where they cannot rely on absolute statutory immunity from suit, such as under the Section 230 or the Digital Millenium Copyright Act (“DMCA”), 17 U.S.C. § 512. For example, during the last Presidential election campaign, some of the networks objected to the fact that both Senator McCain and then-Senator Obama used tiny clips from news broadcasts in the course of political ads carried on YouTube. The networks did not complain to the campaigns, or file suit against them for copyright infringement; in fact, no such suit would have been tenable, because these were obvious examples of fair use. Instead, they filed takedown notices under the DMCA, and Google was unwilling to make an individualized decision about the specific videos. Google just took the YouTube videos down and kept them down for the entire period of time required to retain its immunity from suit under the DMCA. This is the standard operating procedure for ISP’s – cling to your statutory immunity and do nothing to risk it. The ISP keeps its protection, but the speech of the consumer (or other person) is sacrificed.

Senator McCain vigorously objected to Google, pointing out that the removal

of speech even for only two weeks may well be devastating in the context of a political campaign and urged Google to carve out an exception to its normal policy for clips sponsored by the campaigns of candidates for public office. Google was obdurate, pointing out that it is not always easy to distinguish video clips submitted by political candidates, noting that many other users engage in constitutionally important speech, and suggesting that Senator McCain should instead consider changing the law to protect the fair use rights of all speakers. The important point here, however, is that YouTube was simply doing what almost all ISP's do in these circumstances. They do nothing to risk the immunity provided by the law.

Seen from the ISP's perspective, the insistence is understandable. Most web site operators pay a relative pittance for hosting, or they pay nothing, and the site is supported by advertising. The margin of profit on any one web site, or one blog, or one YouTube account, is tiny. The hosts make their money by handling a large volume of sites and automating their relationship with the content providers (their clients, the actual operators of individual web sites). Without absolute immunity, the profits from hosting any one site would be vastly outweighed by the mere expense of defending against a defamation claim, at several hundred dollars an hour. (If there is immunity, the law is so clear that a plaintiff risks sanctions by filing suit.) Even

the expense of hiring legal professionals to examine claims that are put forward about particular speech being defamatory (or otherwise actionable) far exceeds the revenue that can be gained from hosting the web site at issue. And as a practical matter, this review must be done by legal professionals because, absent statutory immunity, what the ISP must do is assess the risk of being held liable if a court concludes otherwise than it does. So, what the ISP's need is immunity, not the possibility of making a vague public policy argument. Without immunity, almost every ISP is going to take the easy way out and just remove the challenged speech.

Of course, one could argue – and we do make this argument on behalf of our clients when communicating with ISP's – that if a given ISP gets a reputation for being a pushover and giving in to threats too easily, that could be bad for business, because web site operators will go elsewhere with their web hosting business. But that argument usually doesn't work, because **nearly every** ISP gives in easily when there is a realistic threat of litigation to which section 230 immunity would not apply.

Knowing this, a cynical target of critical speech who wants to suppress that speech doesn't have to bother to file suit against the offending speaker or web site host, or obtain any judicial determination that the speech was actionable. Such

companies or individuals just go up the line of web hosts, looking for a company that provides Internet access for companies lower down in the chain of hosting companies, that has no real stake in the controversy affecting its customers, and that is ready to cave in.

They do this recognizing that, by creating a threat of expensive litigation in which the ISP will have to make public policy arguments appealing to somewhat unsettled law, they will intimidate the ISP into simply pulling the plug on the customer rather than risking litigation expense and even enforcement of a foreign judgment. If the first ISP proves not to be a weak link, they go up the line further to an ISP that provides services for the first ISP, until they find a weak link who will suppress free speech rather than pay to litigate the client's rights in a case where the ISP is, after all, just a stakeholder concerning somebody else's free speech rights.

In the end, if someone who wants to suppress speech can find a way to file suit in another country – or even to **threaten** to file suit in some other country – they will often push the ISP to just give up its customer's rights. That would, in Public Citizen's opinion, have happened in the instance discussed in the attached letter had SoftLayer not had the benefit of an offer of pro bono representation from Public

Citizen. Of course, there are not many ISP's that can get pro bono services for a case like this one.

SoftLayer's CEO had the strength of character to take a stand against such bullying – and in our judgment deserves a great deal of credit for doing so – but there are other instances in our practice where the ISP simply told the speaker to take his business elsewhere rather than imposing on the ISP's low-margin budget with litigation expenses. In one case we are handling, the target of the speech first went to the ISP where the site was hosted; the ISP relies on its section 230 immunity; so the speech-suppressor went to the data center from which the ISP bought Internet access for all of its customers. The data center caved, telling the ISP that it would take down all of the ISP's customers unless the ISP sacrificed this one customer. The case is discussed at <http://pubcit.typepad.com/clpblog/2008/10/another-case-of.html> and <http://pubcit.typepad.com/clpblog/2008/10/did-some-isps-g.html>. There, the speech-suppressor was relying on the trademark exception to section 230 to threaten the ISP's with litigation, because he claimed that some hyperlinks on a critical web site infringed his trademark. But as the SoftLayer situation shows, it is all too easy to do the same thing in the libel tourism context.

The solution is to expand the libel tourism bill to provide that judgments in contravention of section 230 are against public policy.

Note that our original client here, Ms. Forte, is a small player, someone who had a clever idea for a consumer information web site. But the problem is a bigger one. It will ultimately affect newspapers and broadcasting stations, for example. It is generally said that the real future for the newspaper industry and even radio and TV is through their online presence. A smaller newspaper or radio or TV station is unlikely to have the clout with an ISP to persuade it to keep its material online when a libel tourism threat comes in. Maybe the New York Times, or Gannett, brings in enough business to an ISP that the ISP is willing to take its chances on being sued along with the media entity. But the small player, even small media entities, will generally not get the benefit of such consideration. Similarly, groups in the United States that focus on protecting human rights abroad (or groups abroad that host their speech on United- States-based servers to take advantage of our free speech traditions) could easily have their web sites shut down by threats to sue their web hosts for defamation.

In our view, including section 230 in the public policies expressly protected by

the proposed statute is the key. This could be accomplished by moving the definitions section to a new subsection (c) and including the following subsection (b):

“(b) Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment against the provider of an interactive computer service (as defined in 47 U.S.C. § 230) concerning a published communication unless the domestic court determines that the foreign judgment is consistent with the express terms and purpose of 47 U.S.C. § 230.



## PUBLIC CITIZEN LITIGATION GROUP

1600 20TH STREET, N.W.  
WASHINGTON, D.C. 20009-1001

—  
(202) 588-1000

February 10, 2009

Erica Simpson, Esquire  
Hammonds LLP  
Rutland House  
148 Edmund Street  
Birmingham B3 2JR DX 708610  
United Kingdom

Dear Ms. Simpson:

I write on behalf of SoftLayer Technologies, Inc., in response to your letter of January 8, 2009, threatening a claim for defamation based on the contention that SoftLayer is publishing defamatory messages about Mistral Telecom Limited on the web site whocallsme.com.

SoftLayer is not the publisher of the messages identified in your letter. SoftLayer makes Internet access available to its customers, including the proprietor of whocallsme.com. That proprietor, in turn, has chosen to create an interactive message board that allows members of the public to post information about companies that make telemarketing calls, identifying each company by the telemarketing number that it uses. SoftLayer is no more the publisher of the messages posted on its customer's message board than the post office is the publisher of allegedly defamatory messages that are sent through the mails, or than the City of London is a publisher of the comments made at Speaker's Corner in Hyde Park.

SoftLayer provides Internet access for more than 5500 customers, on more than 18,000 servers deployed in data centers in several parts of the United States. Its customers have placed roughly 9000 terabytes of data online, and their web pages, if printed, would consume hundreds of millions of pages. It is unreasonable to expect SoftLayer to pore through the entire opus of all of its customers to find and remove whatever words you may deem defamatory. Indeed, your letter makes clear that you have not identified all of the allegedly defamatory words, and you have not supplied the precise URL's of even the allegedly defamatory words set forth in your letter. Assuming that Mistral intends to proceed in this matter, you should identify the allegedly defamatory words exhaustively. Nor can we accept your suggestion that the entire consumer conversation about Mistral should be taken offline simply because some contributions to that conversation have allegedly been defamatory.

Moreover, under 47 U.S.C. § 230, which regulates the activities of the providers of interactive computer services, SoftLayer is immune from suit based on the material that its customers post to the Internet by means of the SoftLayer service, just as SoftLayer's customer (the proprietor

Erica Simpson, Esquire  
 February 10, 2009  
 page 2

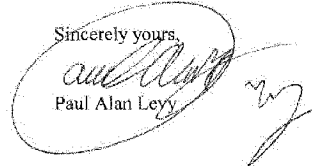
of whocallsme.com) is immune from suit based on the content of allegedly defamatory posted to the message boards that it operates. See *Doe v. MySpace, Inc.*, 528 F.3d 413, 422 (5th Cir. 2008); *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997). Moreover, under U.S. law, the courts generally agree that constitutional due process does not permit the operator of a passive web site, which provides the opportunity to see information but does not afford the capability of forming contracts online, to be subject to personal jurisdiction at every location where allegedly tortious speech can be downloaded and read. We are confident that any judgment that your client might obtain would be unenforceable in the United States as a matter of public policy, not to speak of the First Amendment and the Due Process Clause. See, e.g., *Telnikoff v. Matusevich*, 347 Md. 561, 702 A.2d 230 (1996). Other states are following this example, and both New York and Illinois have adopted statutes implementing the same principle. McKinney's CPLR § 5304(b)(8); 735 ILCS 5/12-621(b)(7). Accordingly, Public Citizen has agreed to represent SoftLayer in opposition to such a judgment if Mistral tries to obtain one.

That is not to say that process is unavailable for Mistral to identify the posters of the allegedly defamatory comments so that it can proceed against **them** for speech that Mistral believes is wrongful, so long as it makes a proper showing under the standard Doe procedure. E.g., *In re Does 1-10*, 242 S.W.3d 805 (Tex. App.-Texarkana, 2007). However, SoftLayer does not have access to any identifying information, which would have to be obtained from the operator of the whocallsme.com web site. In addition, it appears that the whocallsme.com message board operated by SoftLayer's customer would allow Mistral to reply to the criticisms posted there. Perhaps it would be to Mistral's advantage to explain what it believes are the true facts on the message board, trusting to the good sense of consumers to separate fact from fiction and decide who is telling the truth.

In conclusion, if you intend to pursue this matter, SoftLayer will accept any final determination of liability for the allegedly defamatory words by a court of competent jurisdiction in the United States. You may effect service of any judicial process at SoftLayer's corporate offices at 6400 International Parkway, Suite 2000, Plano, Texas 75093. I should be grateful, however, if you would send me a courtesy copy.

Sincerely yours,

Paul Alan Levy



LETTER FROM ERIC RASSBACH, NATIONAL LITIGATION DIRECTOR, AND L. BENNETT GRAHAM, LEGISLATIVE AND INTERNATIONAL PROGRAMS OFFICER, THE BECKET FUND FOR RELIGIOUS LIBERTY



February 19, 2009

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John M. Templeton, Jr., M.D.  
Bryn Mawr, Pennsylvania

Rep. Steve Cohen [TN-9]  
1035 Longworth House  
Office Building  
Washington, DC 20515

Dear Chairman Cohen,

The Becket Fund for Religious Liberty commands you and your Subcommittee for convening this hearing on "Libel Tourism." As you have emphasized, the protection of the inalienable rights to freedom of expression and freedom of conscience are core principles of our Nation. We are particularly pleased that Congress is reiterating the protections of the First Amendment at a time when many foreign nations seek to muzzle American citizens from afar.

We write to draw especial attention to a major problem addressed by both HR 6146 and HR 5814. The concept of the so-called "defamation of religions" has become a major concern at the international level as bodies like the United Nations and the Organisation of the Islamic Conference promote it ostensibly as a way to promote respect and tolerance. Unfortunately, this concept directly contradicts traditional human rights legal protections and increases social unrest rather than decreasing it.

Traditional defamation laws are meant to protect individuals from public slander or libel that would negatively affect their livelihood, and are closely aligned with individual and personal, rather than group, rights. The traditional defense to a defamation lawsuit is the truth, as defamation laws are meant to inhibit someone from using mistruths to harm another.

"Defamation of religions" measures, however, are meant to shield beliefs, ideas, and philosophies from criticism or disagreement. Yet religions make conflicting truth claims and indeed the diversity of truth claims is something that religious freedom as a concept is designed to protect. Thus, truth defense to a typical defamation lawsuit can apply in a "defamation of religions" case only to those ideas, worldviews, or religious beliefs the government decides are true.

Thus "defamation of religions," as opposed to the defamation of persons, forcibly requires the state to determine which ideas are acceptable, as opposed to which facts are true. "Defamation of religions" measures are thus distinct from traditional defamation laws because they do not protect persons, good faith speech, or dissent.

Enforcement of local "defamation of religions" measures in countries such as Pakistan, including anti-blasphemy and anti-vilification laws, is typically left to the unbridled discretion of local officials who are free to act on their own prejudices. "Defamation of religions" measures have thus led governments to prosecute dissenters for "unreasonable" and "offensive" speech. These standards have been read to include giving charitable aid, criticizing a religious belief, or even telling someone that God would be happier if that person followed a different religion. There is no religious believer – including those who promote such laws – who does not value the ability to assert that his or her beliefs about religious truths are not only better, but true. Indeed, freedom of conscience and its expression is rooted in the truth of the inherent dignity of the human person, not in the fickle will of the state. Ultimately, "defamation of religions" measures empower majorities against dissenters and the state against individuals.

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In maintaining the United States judiciary's traditional interpretation of the First Amendment, both HR 5814 and HR 6146 prohibit a domestic court from recognizing or enforcing a foreign judgment concerning defamation unless the domestic court determines that the foreign judgment is consistent with the First Amendment to the United States Constitution. This restoration of American protections for free expression and freedom of conscience is one appropriate response to the adverse effects foreign "defamation of religions" laws may have on American citizens. This legislation will maintain the traditionally high hurdles for defamation claims in the United States and will protect the free marketplace of ideas in this country. We therefore commend you for your efforts to stand for bedrock principles of American liberty and offer to assist in those efforts in any way we can.

Sincerely yours,

Eric Rassbach  
National Litigation Director  
The Becket Fund for Religious Liberty

L. Bennett Graham  
Legislative and International Programs Officer  
The Becket Fund for Religious Liberty

## PREPARED STATEMENT OF YASMINE LABLOU

**Libel Tourism: A Transatlantic Quandary**

Yasmine Lahlou\*

**Introduction**

In 2004, three Saudi nationals sued a New York author and her U.S. publisher for defamation in England, which has libel laws that are favorable to plaintiffs, and obtained a default judgment against them. In reaction to this lawsuit, this year for “last year” if published in 2009, the New York State Legislature adopted the Libel Terrorism Protection Act in order to “protect journalists and authors by declaring foreign defamation judgments unenforceable in New York unless the foreign defamation law provides, in substance and application, the same free speech protections guaranteed under our own Constitution, and by giving New York residents and publishers the opportunity to have their day in court here in New York.”<sup>1</sup> It was signed into law by Governor Patterson on April 28, 2008.

Libel tourism (or terrorism) has become the new battle ground of free-speech advocates. Libel tourism describes situations where plaintiffs who believe they have been defamed go forum shopping for the courts of a country that is more likely to allow their claims and award them high and dissuasive damages, irrespective of the tenuous nexus between the forum and the substance of the dispute. England has become the focus of the ire of free speech advocates because its courts have shown a willingness to give the benefit of the country’s pro-plaintiff libel laws to foreign plaintiffs. Earlier this year for “Last year”, Igor Akhmetov, a Ukrainian businessman, sued a Ukraine-based English speaking newspaper, the *Kyiv Post*, in England for defamation. The plaintiff invoked the paper’s 100 subscribers in England to justify the English court’s jurisdiction. Fearing potential exposure under English law, the newspaper settled.<sup>2</sup> This year, Mr. Akhmetov also sued Obozrevatel (Observer), an internet news site that does not even publish in English, in an English court. Judgment was entered against the defendant, who did not appear in the proceedings.<sup>3</sup>

Plaintiffs have long sought out jurisdictions where defamation laws are favorable to their cases. English laws are particularly attractive in this regard and England has established a reputation as one of the friendliest forums for plaintiffs.<sup>4</sup> The United States, on the other hand, has enthusiastically protected libel defendants based on the rights afforded under the First Amendment of the Constitution.<sup>5</sup> A clear conflict arises where defamation judgments obtained in plaintiff friendly jurisdictions, such as England,

\* Associate Clifford Chance US LLP. The author would like to thank Richard Winfield for his precious guidance.

<sup>1</sup> S. 6687-C, 2008 (N.Y. 2008).

<sup>2</sup> *Hacks v. Beaks*, THE ECONOMIST, May 10, 2008, page 70.

<sup>3</sup> *Hacks v. Beaks*, THE ECONOMIST, May 10, 2008, page 70.

<sup>4</sup> Raymond W. Beauchamp, *England’s Chilling Forecast: the Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech*, 74 FORDHAM L. REV. 3073, 3075 (2006).

<sup>5</sup> See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

are sought to be enforced in countries where freedom of speech is heavily protected, such as the United States. The New York Legislature reacted to exactly such a situation by enacting a law that broadens New York courts' authority to issue declaratory judgments that foreign libel judgments will not be enforced in New York if they violate the New York and U.S. constitutional standards of free speech.

This article will discuss New York's new statute, the Libel Terrorism Protection Act, and the dispute between a New York based journalist and a Saudi family that prompted the New York Legislature to adopt it. Part I of this article describes the origins of the act, which amended New York's long-arm jurisdiction statute and the provisions on non-recognition of foreign judgments.<sup>6</sup> Part II of this article questions whether the new statute complies with the U.S. Constitutional Due Process. Finally, Part III of the article explores whether the act truly affords additional protection for the media industry.

### I. The Origins of the New York Statute

In 2003, Bonus Books, a Chicago-based publisher, published a book authored by Rachel Ehrenfeld, *Funding Evil, How Terrorism is Financed - And How to Stop It* ("Funding Evil"), in which it is alleged that three Saudi businessmen, Khalid Salim Bin Mahfouz and his two sons, are amongst the main sponsors of Al Qaeda as well as other terrorist organizations. By December 2003, 23 copies of the book had been purchased in England through online retailers and an excerpt had been published on the ABC News website.

#### A. *The Proceedings in the High Court in England*

On January 23, 2004, Khalid Salim Bin Mahfouz's English counsel sent a cease-and-desist letter to Ehrenfeld in New York, asking her (i) to promise to the High Court in England that she would refrain from repeating similar allegations; (ii) to destroy or deliver to him all copies of *Funding Evil*; (iii) issue a letter of apology to be published at her expense; (iv) make a charitable donation; and (v) pay Khalid Bin Mahfouz's legal costs in exchange for his agreement not to bring a defamation action against her.<sup>7</sup> When Ehrenfeld did not accept the offer, the Bin Mahfouz sued both Bonus Books and Ehrenfeld in defamation before the High Court of Justice in England seeking injunctive relief and damages.<sup>8</sup> Pursuant to an order of the English court, the Bin Mahfouz served papers upon Ehrenfeld at her New York City apartment on

<sup>6</sup> Legislation had been introduced both in the United States House of Representatives and the United States Senate that sought to achieve the Libel Terrorism Protection Act's objectives. The legislation introduced in the House (H.R. 6146) would prohibit U.S. courts from enforcing foreign defamation judgments unless the court determines that the judgment is consistent with the First Amendment. The legislation introduced in the Senate (S. 2977) would enable a United States author or publisher sued for libel in a foreign court to collect treble damages in the United States if a court determines that the foreign plaintiff "intentionally engaged in a scheme" to suppress the defendant's First Amendment rights.

<sup>7</sup> Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830, 832 (N.Y. 2007).

<sup>8</sup> *Id.*

four occasions: October 22, 2004, December 30, 2004, March 3, 2005 and May 19, 2005.<sup>9</sup> These communications all concerned the English action.

No defendant appeared before the English High Court, which, on December 7, 2004, entered a default order against Ehrenfeld and Bonus Books, providing for an award of damages and enjoining the further publication of the defamatory statements in England and Wales.<sup>10</sup> On May 3, 2005, the court entered a second order declaring the allegedly defamatory statements false, setting damages at £10,000 for each of the three claimants, requiring Ehrenfeld and Bonus Books to publish an apology, mandating that the December 7, 2004 injunction remain in force and awarding plaintiffs their costs.<sup>11</sup>

On December 8, 2004, a day after the English High Court had issued its first ruling, Ehrenfeld filed a lawsuit in the United States District Court for the Southern District of New York against Khalid Salim Bin Mahfouz, seeking a declaratory judgment that (i) Bin Mahfouz could not prevail on a libel claim against her under federal or New York law; and (ii) the English judgment would not be enforceable in the United States.<sup>12</sup> She complained, both in court and in the course of a media campaign, of the chilling effect such actions in England have on investigative journalists' ability to publish works on terrorism.<sup>13</sup>

After the district court dismissed the action for lack of personal jurisdiction against the defendant,<sup>14</sup> Ehrenfeld appealed to the United States Court of Appeals for the Second Circuit.<sup>15</sup>

#### B. *The Proceedings in the U.S.*

##### I. THE SECOND CIRCUIT COURT OF APPEALS CERTIFIES A QUESTION TO THE NEW YORK COURT OF APPEALS

Ehrenfeld argued that New York courts had personal jurisdiction over Bin Mahfouz because (i) he had served her in New York with a letter stating his claims in the English proceedings; (ii) he had sent her letters and e-mails relating to the English case on at least six occasions; (iii) his representatives had served her in New York with papers pertaining to the English proceedings on four occasions; and (iv) he had sent her the English court's order by email and mail in New York.<sup>16</sup> Ehrenfeld invoked two specific provisions of the New York long-arm jurisdiction statute to assert that courts in New York had personal

<sup>9</sup> *Id.*

<sup>10</sup> Bin Mahfouz v. Ehrenfeld, [2005] EWHC 1156 (QB) at para. 21.

<sup>11</sup> *Id.* at paras. 74-75.

<sup>12</sup> Ehrenfeld v. Bin Mahfouz, No. 04 Civ. 9641 (RCC), 2006 WL 1096816 at \*2 (S.D.N.Y. April 26, 2006).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at \*3.

<sup>15</sup> Ehrenfeld v. Bin Mahfouz, 489 F.3d 542 (2d Cir. 2007).

<sup>16</sup> *Id.* at 548-49.

jurisdiction against Bin Mahfouz,<sup>17</sup> namely New York Civil Practice Law and Rules (“NY CPLR”) sections 302(a)(3) and 302(a)(1).<sup>18</sup>

NY CPLR section 302(a)(3) allows the exercise of personal jurisdiction over a non-domiciliary when (i) a defendant commits a tortious act outside of the state of New York; (ii) the plaintiff’s cause of action arises from that act; (iii) the act caused injury to a person or property within the state; (iv) the defendant expected or reasonably could have expected the act to have consequences in the state; and (v) the defendant derived substantial revenue from interstate or international commerce.<sup>19</sup> The Second Circuit Court dismissed the application of that provision because Ehrenfeld did not allege that Bin Mahfouz had committed any tort.<sup>20</sup>

NY CPLR section 302(a)(1) confers jurisdiction over a non-domiciliary defendant who “in person or through an agent ... transacts any business within the state” so long as the cause of action arises out of the defendant’s New York transactions. The district court had held it lacked personal jurisdiction under section 302(a)(1) because Bin Mahfouz’s communications to Ehrenfeld in New York regarding the English action and the web site postings, “however persistent, vexing or otherwise meant to coerce, do not appear to support any business objective.”<sup>21</sup>

The Second Circuit noted that under New York law, a non-domiciliary transacts business in New York “by fully avail[ing] [him or herself] of the privilege of conducting activities within the ... State, thus invoking the benefits and protections of its laws.”<sup>22</sup> Courts applying section 302(a)(1) have held that (i) a non-commercial activity may qualify as the transaction of business;<sup>23</sup> and (ii) a single transaction may suffice to invoke jurisdiction “even though the defendant never enter[ed] New York, so long as the defendant’s activities [in New York] were purposeful and there is substantial relationship between the transaction and the claim asserted.”<sup>24</sup> However, a single cease-and-desist letter sent to a New York resident in an attempt to settle legal claims was found to be insufficient to justify the New York courts’ personal jurisdiction against out-of-state defendants.<sup>25</sup>

<sup>17</sup> A federal court sitting in diversity exercises personal jurisdiction over a foreign defendant to the same extent as courts of general jurisdiction of the state in which it sits, pursuant to Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 124 (2d Cir. 2002).

<sup>18</sup> *Ehrenfeld*, 489 F.3d at 545.

<sup>19</sup> *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210 (NY 2000).

<sup>20</sup> *Ehrenfeld v. Bin Mahfouz*, 489 F.3d 542, 551 (2d Cir. 2007).

<sup>21</sup> *Ehrenfeld v. Bin Mahfouz*, 2006 WL 1096816 at \*4.

<sup>22</sup> *Ehrenfeld*, 489 F.3d at 548 (citing *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 382 (1967) quoting *Hanson v. Deckla*, 357 U.S. 235, 253 (1958)).

<sup>23</sup> *Ehrenfeld*, 489 F.3d at 548 (citing *Padilla v. Rumsfeld*, 352 F.3d 695, 709 & n. 19 (2d Cir. 2003)).

<sup>24</sup> *Ehrenfeld*, 489 F.3d at 548 (citing *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1109 (2d Cir. 1997)).

<sup>25</sup> A cease-and-desist letter and subsequent communications used to secure further investments in New York by the recipient may be sufficient to find personal jurisdiction. *Ehrenfeld*, 489 F.3d at 548 (citing *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1109 (2d Cir. 1997)).



Considering however that (i) no New York court had ever assessed whether Bin Mahfouz's alleged contacts with New York were sufficient under New York law to justify asserting personal jurisdiction against a non-domiciliary,<sup>26</sup> and (ii) the issue (a) was significant, (b) implicated the State of New York's public policy and (c) was likely to repeat itself,<sup>27</sup> the Second Circuit certified to the New York Court of Appeals, the highest court in New York, the following question: whether section 302(a)(1) of the New York's long-arm statute confers personal jurisdiction over the defendant?<sup>28</sup> In the same decision, the Second Circuit Court affirmed the District Court's holding that section 302(a)(3) was not applicable.<sup>29</sup>

2. THE NEW YORK COURT OF APPEALS HOLDS THAT NEW YORK COURTS LACK  
PERSONAL JURISDICTION OVER BIN MAHFOUZ

At the outset, the Court of Appeals insisted that it was "called upon to decide a narrow issue"<sup>22a</sup> and "however pernicious the effect of [libel tourism] may be, our duty here is to determine whether defendant's New York contacts establish a proper basis for jurisdiction under C.P.L.R. 302(a)(1)."<sup>30</sup>

The Court of Appeals first insisted that to assert personal jurisdiction against a non-domiciliary who allegedly transacted business within New York, "[t]he overriding criterion' necessary to establish a transaction of business is "some act by which the defendant purposefully avails himself of the privilege of conducting activities within [New York]."<sup>31</sup> The Court of Appeals found that none of Bin Mahfouz's contacts "invoked the privileges or protections of [New York] laws. Quite to the contrary, his communications in this state were intended to further his assertion of rights under the laws of England. As defendant points out -and plaintiff does not dispute- his pre-filing demand letter and his service of documents were required under English procedural rules governing the prosecution of defamation actions. And in none of his letters to plaintiff did defendant seek to consummate a New York transaction or to invoke our State's laws."<sup>32</sup>

<sup>26</sup> *Ehrenfeld*, 489 F.3d at 549.

<sup>27</sup> *Ehrenfeld*, 489 F.3d at 549.

<sup>28</sup> *Ehrenfeld*, 489 F.3d at 551. Under New York law, "whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative question of new York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists, the court may certify the dispositive questions of law to the Court of Appeals." N.Y. Comp. Codes R. & Regs. Tit. 22, § 500.27(a) (2006).

<sup>29</sup> *Ehrenfeld*, 489 F.3d at 551.

<sup>22a</sup> *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830, 833 (N.Y. 2007).

<sup>23</sup> *Id.* at 834.

<sup>24</sup> *Id.* at 834 (quoting *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 382 (1967)).

<sup>25</sup> *Id.* at 835.

The Court of Appeals dismissed Ehrenfeld's argument that Bin Mahfouz's refusal to waive his right to enforce the English judgment constituted a purposeful availment of New York laws.<sup>33</sup>

Finally, Ehrenfeld sought to invoke the holding of the Ninth Circuit Court of Appeals in *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*.<sup>34,27a</sup> In that case, the Ninth Circuit found it had personal jurisdiction to issue a declaratory judgment against two French civil rights groups who had obtained French court orders against Yahoo! Inc., a California-based internet service provider, that the French court orders were unenforceable in the U.S.<sup>27b</sup> The New York Court of Appeals dismissed Ehrenfeld's argument because California's long-arm statute is coextensive with federal due process requirements whereas "[the New York Court of Appeals has] repeatedly recognized that New York's long-arm statute 'does not confer jurisdiction in every case where it is constitutionally permissible.'"<sup>35</sup> The Ninth Circuit had relied on the effects of the French defendants' conduct in California.<sup>28a</sup> The New York Court of Appeals noted that, in tort actions, NY CPLR, section 302(a)(3) specifically subjects out of state domiciliaries to personal jurisdiction in New York where their out of state conduct has had an effect in New York state.<sup>28b</sup> Since the New York statute only permitted reliance on the effects test under section 302(a)(3), the Court of Appeals held that using "such an effects test [under section 302(a)(1)] 'would be an unwarranted extension of [that provision] and a usurpation of a function more properly belonging to the Legislature.'"<sup>36</sup>

The New York Court of Appeals therefore held that section 302(a)(1) did not confer personal jurisdiction against Bin Mahfouz and answered the certified question in the negative.<sup>37</sup> The Second Circuit subsequently affirmed the District Court's decision in its entirety and dismissed Ehrenfeld's action.<sup>38</sup>

<sup>26</sup> *Id.* at 836. According to Ehrenfeld, the "future New York contact" of potential enforcement is "crucial" to finding jurisdiction over the defendant "because (i) the judgment could only be enforced in New York, where Ehrenfeld resides and has all her assets, (ii) the threat of enforcement allegedly led her to decline to publish certain articles and conform her statements to the English libel law; (iii) certain publishers have declined to publish her work for unspecified reasons; and (iv) the English judgment requires her to take action --issue an apology and prevent leakage of the defamatory statements into England and Wales-- in New York."

<sup>27a</sup> *Id.* at 837.

<sup>27b</sup> *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 433 F.3d 1199, 1224 (9th Cir. 2006). In that case, however, the Court of Appeals dismissed the action for lack of ripeness.

<sup>27c</sup> *Yahoo! Inc.*, 433 F.3d at 1224.

<sup>35</sup> *Ehrenfeld*, 881 N.E.2d at 837 (quoting *Kreutter v. McFadden Oil*, 71 N.Y.2d 460, 471 (1988)).

<sup>28a</sup> *Yahoo! Inc.*, 433 F.3d at 1209.

<sup>28b</sup> *Ehrenfeld*, 881 N.E.2d at 838 (quoting *Ferrante Equip. Co. v. Lasker-Goldman Corp.*, 26 NY2d 280, 286-286 (1970)).

<sup>36</sup> *Ehrenfeld*, 881 N.E.2d at 838.

<sup>37</sup> *Id.*

<sup>38</sup> *Ehrenfeld v. Mahfouz*, 518 F.3d 102, 106 (2d Cir. 2008). In the same decision, the Second Circuit Court dismissed Ehrenfeld's claim that the Court of Appeals' interpretation of section 302(a)(1) violated the First Amendment on the ground that her failure to raise this issue in prior proceedings amounted to a waiver of the claim.

## II. Will the Newly Amended New York Long-Arm Statute Pass Constitutional Muster?

While the proceedings were pending in the United States courts, New York Senator Dean Skelos<sup>31a</sup> and Assemblyman Rory I. Lancman sponsored the Libel Terrorism Protection Bill.<sup>39</sup>

The bill was signed into law by New York State Governor Patterson on April 28, 2008.<sup>40</sup>

### A. *The New York State Legislature Amends the State's Long-Arm Statute*

Heeding to the Court of Appeals' invitation that any expansion of the New York long arm jurisdiction statute be done only through legislative intervention, the New York State Legislature amended the scope of that statute by adding a new section, N.Y. C.P.L.R. section 302(d), titled "Foreign Defamation Judgment," which provides:

The courts of this state shall 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 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 section fifty-three hundred four of this chapter [providing grounds for non-recognition of foreign country money judgments], to the fullest extent permitted by the United States Constitution, provided:

1. the publication at issue was published in New York, and
2. that 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. The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision.<sup>33a</sup>

### B. *The Impact of the Due Process Clause on the New York Amendment*

The United States Supreme Court held that a court may exercise personal jurisdiction over a defendant consistent with constitutional due process only if that defendant has "certain minimum

<sup>31a</sup> S. 6687-C, 2008 (N.Y. 2008), <http://public.leginfo.state.ny.us/menuetf.cgi> (Bill Number: S6687, Year: 2008)

<sup>31</sup> A. 9652-C (N.Y. 2008), <http://assembly.state.ny.us/leg/?bn=A09652>

<sup>40</sup> *Id.* Dr. Ehrenfeld has not re-filed her lawsuit against Mr. bin Mahfouz. Her counsel informed us the author that they are waiting to see what, if any, federal legislation is enacted

<sup>33a</sup> N.Y. C.P.L.R. § 302(d) (2008).

contacts” with the relevant forum “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>41</sup> The “concept of ‘fair play and substantial justice’ may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.”<sup>42</sup>

The new provision gives New York courts jurisdiction over a non-domiciliary for a declaratory action that the foreign libel judgment should not be recognized in New York on the grounds that the party seeking the declaratory judgment has assets in New York that “might be used to satisfy the foreign defamation judgment” or “may have to take actions in New York to comply with the foreign defamation judgment,” provided the publication at issue was made in New York.<sup>35a</sup> The new statute’s almost exclusive reliance on the New York plaintiff’s contacts with New York may prove problematic.

Under the new statute, while the plaintiff’s contacts with New York are manifest, the defendant’s “minimum contacts” with the forum are less discernible. The wording of the new statutory provisions are better understood if read in light of the Ninth Circuit’s decision in *Yahoo! Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*.<sup>43</sup>

In *Yahoo!* two French civil rights groups had obtained French court orders that required Yahoo! Inc. to prevent users of its French Web site from accessing certain Web pages that provided access to Nazi propaganda and paraphernalia.<sup>36a</sup> The orders required Yahoo! to alter its servers, located in California, under threat of a substantial monetary penalty.<sup>36b</sup> In return, Yahoo! sued the French groups in federal court in California, seeking a declaratory judgment that the French orders were not enforceable or recognizable in the U.S. based on the orders’ violation of Yahoo!’s First Amendment rights.<sup>36c</sup> The Ninth Circuit found it had personal jurisdiction against the defendants on the basis of the effects in California of the French civil rights group’s conduct in France.<sup>44</sup> Under California law, courts cannot exercise specific jurisdiction<sup>45</sup> against a non-resident defendant unless (i) the non-resident defendant has purposefully directed his or her activities or consummated some transaction with the forum or resident thereof or

<sup>41</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>42</sup> *Realuyo v. Villa Abrille*, 32 Med.L.Rptr 1427, 1434 (S.D.N.Y. July 8, 2003) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 426, 477-78 (1985)).

<sup>35a</sup> N.Y. C.P.L.R. § 302(d) (2008).

<sup>43</sup> *Yahoo! Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).

<sup>36a</sup> *Id.* at 1202.

<sup>36b</sup> *Id.* at 1203.

<sup>36c</sup> *Id.* at 1201.

<sup>44</sup> *Id.* at 1211. The Court of Appeals dismissed the action for lack of ripeness, however. *Id.*

<sup>45</sup> A non-resident may be subject to general or specific personal jurisdiction. If subject to general jurisdiction, which is available when the defendant has systematic and continuous contacts with the forum, the resident is amenable in the relevant U.S. forum for any cause of action, whether or not it arises out of the defendant’s contacts with the forum. *Perkins v. Benguet*, 342 U.S. 437 (1952). If a nonresident defendant’s activities within the forum state are less substantial, then courts may still exercise specific personal jurisdiction where the action arises out of or is related to the defendant’s particular activities within the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

performed some act by which he has purposefully availed himself of the privilege of conducting activities in the forum, thereby invoking the benefits and privilege of its laws; (ii) the claim arises out of or relates to the defendant's forum-related activities; and (iii) the exercise of personal jurisdiction comports with fair play and substantial justice, *i.e.*, it must be reasonable.<sup>46</sup> For the Ninth Circuit, the first prong, which was determinative, could be satisfied by purposeful availment of the privilege of doing business in the forum or by purposeful direction of activities at the forum or by a combination of both.<sup>47</sup> With respect to purposeful direction in tort cases, the Supreme Court in *Calder v. Jones* previously had upheld California courts' personal jurisdiction over defendants domiciled in Florida because "their intentional, and allegedly tortious, actions were expressly aimed at California."<sup>48</sup> The Ninth Circuit has interpreted *Calder* to impose three requirements: the defendant must have (i) committed an intentional act; (ii) expressly aimed at the forum; and (iii) causing harm that the defendant knows is likely to be suffered in the forum state.<sup>49</sup> The Ninth Circuit court found that the first two requirements had been met in *Yahoo!* because the French plaintiffs' suit was expressly aimed at California since the French court orders required Yahoo! to "perform significant acts" in California.<sup>50</sup> Although it found the third requirement more problematic since Yahoo! did not allege any specific way in which it had altered its behavior as a result of the French decisions, the court nevertheless determined that Yahoo! could potentially suffer harm in California. The court concluded "considering the direct relationship between [the French groups'] contacts with the forum and the substance of the suit brought by Yahoo!, as well as the impact and potential impact of the French court's orders on Yahoo!, we hold there is personal jurisdiction" over the French defendants.<sup>51</sup>

The Libel Terrorism Protection Act clearly adopted the *Yahoo!* court's characterization of the initiation of a lawsuit abroad against a United States resident as forum-directed activities. Under the New York statute, provided the publication at issue was made in New York, it is sufficient that the New York party (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, for a court in New York to assert personal jurisdiction against a non-domiciliary.<sup>52</sup>

The first requirement is simply that the New York-based party have assets in New York. According to the Supreme Court, however, "[t]he unilateral activity of those who claim some relationship

<sup>46</sup> *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)).

<sup>47</sup> *Yahoo! Inc.*, 433 F.3d at 1206.

<sup>48</sup> *Calder v. Jones*, 465 U.S. 783, 789 (1984).

<sup>49</sup> *Yahoo! Inc.*, 433 F.3d at 1206 (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 803 (9th Cir. 2004)).

<sup>50</sup> *Yahoo! Inc.*, 433 F.3d at 1209.

<sup>51</sup> *Yahoo! Inc.*, 433 F.3d at 1211.

<sup>52</sup> N.Y. C.P.L.R. § 302(d) (2008).

with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."<sup>53</sup> Without turning jurisdictional analysis on its head, New York litigants may face an uphill battle arguing that a non-domiciliary's defamation lawsuit abroad seeking monetary compensation for a tort suffered outside of New York would constitute a purposeful availment of the privilege of doing business in New York merely because (i) the alleged libel was published by the New York-based party in New York and (ii) the New York-based party has assets in New York.

The second requirement focuses on non-monetary remedies sought by the foreign plaintiff in the foreign court. The Ninth Circuit court of appeals in *Yahoo!* held that securing a foreign decision requiring a California based party to perform specific acts in California satisfied the test requiring the existence of an intentional act expressly aimed at California and causing harm there.<sup>54</sup> It remains to be seen whether New York courts will determine that a lawsuit abroad directed at a US-based party constitutes purposeful availment of the privilege of doing business in New York. Does this mean that any foreign decision imposing some form of specific performance or injunction on a New York based party would constitute purposeful availment? This jurisdictional extension will undeniably raise novel questions for litigants.

In fact, in February, 2008, the chief administrative judge's Advisory Committee on Civil Practice, in a 20-to-2 vote, overwhelmingly urged the New York Legislature to defeat the libel tourism bill because of its potential conflict with the Constitution's due process clause and the defendant's lack of minimum contacts.

### III. A New Ground for Non-Recognition, Really?

#### A. *The New Statute Adds a New Ground For the Non-Recognition of Foreign Judgments*

The Libel Terrorism Protection Act added a new ground for non-recognition of a foreign judgment, contained in NY CPLR section 5304. It allows courts in New York not to recognize foreign money judgments if:

The cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, 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

<sup>53</sup> *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>54</sup> *Yahoo! Inc.*, 433 F.3d at 1209.

and press in that case as would be provided by both the United States and New York constitutions.<sup>55</sup>

*B. The New Statute in Light of Past Precedents*

United States and New York courts generally enforce foreign-money judgments under principles of comity.<sup>56</sup> New York courts may refuse to recognize foreign judgments contrary to the forum's public policy.<sup>57</sup> With respect to foreign judgments affecting free speech, a court in New York held that it was required—not merely had the discretion—to refuse recognition of a foreign libel judgment repugnant to the First Amendment or the New York State Constitution: “if, as claimed by defendant, the public policy to which the foreign judgment is repugnant is embodied in the First Amendment to the United States Constitution or the free speech guaranty of the Constitution of this State, the refusal to recognize the judgment should be, and is deemed to be ‘constitutionally mandatory.’”<sup>58</sup>

In *Bachchan v. India Abroad Publications Inc.*,<sup>59</sup> a New York state court refused to recognize an English libel judgment issued in favor of an Indian national, Bachchan, against the New York operator of a news service because English libel law did not meet the safeguards for the press enunciated by United States courts. Under English law, any published statement that adversely affects a person's reputation, or the respect in which that person is held, is *prima facie* defamatory; plaintiffs' only burden is to establish that the words complained of refer to them, were published by the defendant, and bear a defamatory meaning.<sup>60</sup> Statements of fact are presumed to be false, placing upon the defendant the burden of proving justification, *i.e.*, that the matter is of public concern and the publication is for the public benefit, for the issue of truth to be brought before the jury.<sup>61</sup> The court contrasted this with the requirement that for matters of public concern, the United States Supreme Court had held that the Constitution requires plaintiffs to prove (i) the falsity of the statement and (ii) the defendant's fault.<sup>62</sup> Further, while the U.S. Supreme Court required that a private figure plaintiff prove only simple negligence on the defendant's part, the New York Court of Appeals went even further and adopted a “gross irresponsibility” standard: “where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish by a preponderance of the evidence, that the publisher acted in a

<sup>55</sup> N.Y. C.P.L.R. §304(b)(8) (2008).

<sup>56</sup> See *Hilton v. Guyot*, 159 U.S. 113 (1895); N.Y. CPLR §302 *et seq.*

<sup>57</sup> CPLR §304(B)(4).

<sup>58</sup> *Bachchan v. India Abroad Publications*, 154 Misc.2d 228, 231 (N.Y. Sup. 1992).

<sup>59</sup> 154 Misc. 2d 228 (N.Y. Sup. 1992).

<sup>60</sup> *Bachchan*, 154 Misc.2d at 231.

<sup>61</sup> *Id.*

<sup>62</sup> See *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 775 (1986). The Court had reasoned that placing the burden of proving truth upon the media who publish speech on matters of public concern would have a “chilling” effect ... antithetical to the First Amendment's protection of true speech on matters of public concern[.]” *Id.* at 777.

grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.”<sup>63</sup> The court in *Bachchan* concluded that the First Amendment protection “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 by the U.S. Constitution.”<sup>64</sup>

In another case, relying on *Bachchan*, a federal court in New York refused to apply English law to a defamation claim brought by a Jordanian national against a New York based publisher because “establishment of a claim under the British law of defamation would be antithetical to the First Amendment protections accorded the defendants.”<sup>65</sup>

Thus, even before the New York Legislature adopted the new statute, courts in New York had refused to recognize foreign decisions or apply foreign laws deemed incompatible with the First Amendment protection of free speech. In fact, the existing protection was even stronger since the court in *Bachchan* in fact held it had no discretion but had to refuse recognition of a decision violative of the First Amendment, whereas the Libel Terrorism Protection Act merely gives that discretion to the courts.<sup>66</sup>

One author has argued that American protection of free speech is not only stronger in comparison with the rest of the world, it is in fact exceptional<sup>67</sup> and the Libel Terrorism Protection Act does little to bridge that gap. Interestingly, the United Nations’ Human Rights Committee recently issued a report on the United Kingdom, criticizing the English libel laws for discouraging “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 of ‘libel laws’.”<sup>68</sup> The Committee called on the English government to consider (i) introducing the notion of a ‘public figure’ exception, requiring plaintiffs who are public officials and prominent public figures to prove the defendant acted with actual malice; and (ii) limiting the requirement that defendants reimburse a plaintiff’s fees and costs.<sup>69</sup>

<sup>63</sup> *Bachchan v. India Abroad Publications*, 154 Misc.2d at 234 (quoting *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1975)).

<sup>64</sup> *Bachchan v. India Abroad Publications*, 154 Misc.2d at 235.

<sup>65</sup> *Abdullah v. Sheridan Square Press, Inc.*, No. 93 Civ. 2515 (l.LS), 1994 WL 419847 (S.D.N.Y., May 4, 1994).

<sup>66</sup> N.Y. C.P.L.R. 5304(b) (2008).

<sup>67</sup> Frederick Schauer, *The Exceptional First Amendment*, John F. Kennedy School of Government’s Faculty Research Working Paper Series, RWP05-021, February 2005.

<sup>68</sup> Human Rights Committee, Concluding Observations of the Human Rights Committee on the United Kingdom of Great Britain and Northern Ireland, Ninety third session, CCPR/C/GBR/CO/6, 30 July 2008 at ¶25.

<sup>69</sup> *Id.*



ARTICLE ENTITLED "BRITISH LIBEL LAWS: CUTTING OFF CRUCIAL INFORMATION,"  
BY RICHARD N. WINFIELD

British libel laws: cutting off crucial information

Book review: International Libel and Privacy Handbook, Charles J. Glasser Jr., ed.

By Richard N. Winfield

08.01.06

Do libel laws matter? Do libel laws have any significance other than to a minority of publishers who are sued, and the plaintiffs who sue them?

I thought of these questions when a prominent London solicitor and libel specialist recently spoke to a group of American law students about the so-called "Arab Effect." This was meant to describe the surge of libel suits brought in recent years in English courts by wealthy Arab plaintiffs. More important, it describes the impact of these suits on the law and on coverage of the war on terrorism.

After 9/11, the English and American press began aggressively to investigate and report the sources of financing of terrorism. Typically relying on official sources, the press named numerous well-heeled Arabs identified by the sources as having supported al-Qaida. The Arab plaintiffs retaliated, and retaining English solicitors and barristers, brought suit after suit in London courts against both English and American news organizations.

Despite negligible ties to England, and in some cases, despite minuscule publication of the offending coverage in England, the Arab plaintiffs found jurisdictional homes in the open arms of the English courts. And once jurisdiction was firmly established, the Arab plaintiffs exploited every advantage offered by England's notoriously plaintiff-friendly libel laws.

English law gave the Arab plaintiffs a curious legal presumption; namely, that whatever unflattering statements the press had published about them were assumed to be totally false. The press defendants, therefore, had to bear the burden of proving the truth of their published allegations of links to terrorism. Official documents from non-English sources that the press defendants relied upon were typically inadmissible. The autocracies in the Middle East were ill-disposed to assist Western news organizations seeking to prove allegations about their subjects.

Compared with American practice, pretrial discovery was greatly limited. For example, the press defendants could not examine their Arab adversaries under oath before trial. How else could one prove that in the 1980s an Arab businessman gave funds to Osama Bin Laden?

British libel law

The Arab plaintiffs were secure in the knowledge that:

1. English libel plaintiffs nearly almost always win.
2. Damage awards are typically substantial.

3. The losing press defendants must also reimburse them for nearly for all their legal fees and costs.

The principal legal advantage favoring the Arab plaintiffs, of course, lay in the absence of a press-protective written constitution. Correspondingly, the press defendants were hobbled by the lack of a written, constitutional guarantee that their good-faith coverage of an important public issue, i.e., financing terrorism, should trump the claims of damaged reputations of public figures involved in the issue. That absence proved fatal to the press defendants.

The Arab Effect predictably produced a succession of legal rulings, settlements, trials, damage awards, and cost-shifting decisions in favor of the Arab plaintiffs and against the English and American press defendants. Millions of pounds were transferred from the press defendants to the Arab plaintiffs and their solicitors and barristers.

The English solicitor who described the Arab Effect to the law students concluded with this observation: "It's over." The price was too high. The English press no longer covers how terrorism was and is financed. England's oppressive libel laws succeeded in cutting off the flow of important information about terrorism to readers in England and elsewhere.

If the Arab Effect is any example, it is fair to conclude that libel laws may have an impact far beyond the immediate concerns of the parties to a libel lawsuit. In any particular country, do the libel laws operate to protect corrupt public officials by penalizing aggressive exposure of corruption? Do journalists face imprisonment if a court rules that they libeled a corrupt politician? Where oppressive libel laws operate to deprive a society of the watchdog role of the press, corruption inevitably flourishes.

#### A needed resource

The idea that libel laws do really matter underlies an important new book, *International Libel & Privacy Handbook: A Global Reference for Journalists, Publishers, Webmasters and Lawyers*, edited by Charles J. Glasser Jr., who is media counsel to Bloomberg News. The handbook is a welcome and needed resource in an era where, to the press, globalization means they can and will be sued anywhere and everywhere.

The handbook examines the libel and privacy laws of 19 nations and explores everything from Internet law to fair use law to the enforcement of foreign judgments. The 30 contributors — including Edward Davis (Davis Wright Tremaine), Slade Metcalf (Hogan & Hartson), and Kurt Wimmer (Covington & Burling) — are among the most experienced and sophisticated media lawyers in the world, with practices in Australia, Belgium, Brazil, China, England, Germany, India, Italy, Russia, Switzerland and the United States, among other nations.

Glasser asked each of his respected contributors to address 21 questions dealing with the law of libel and privacy. In addition to a thoughtful introductory essay with emphasis on four maxims (e.g., "Don't Confuse the Right to Publish With What's Right to Publish"), Glasser also provides a useful appendix by way of a cross-reference chart of certain tenets of media law as set out in the 19 nations' laws.

Glasser correctly notes that the “threat of libel litigation is now exacerbated by the reach of the Internet.” Accordingly, the press has discovered that publishing on the Internet may expose publishers to liability for libel wherever someone can visit their Web sites. In that regard, among others, the handbook offers editors and reporters sensible and expert summaries of libel and privacy laws of those 19 countries where they may face litigation. Its chief attribute is to dispel any illusion that the world of libel law is created in an American image. Nothing could be further from the truth. The First Amendment has not yet been exported.

Consider some commonplaces of foreign libel law that the First Amendment typically forbids here:

- \* Convicting and jailing a journalist for criminal libel.
- \* Extra protections against criticism for high office holders.
- \* Obligatory right-of-reply laws.
- \* Confiscation of press runs.
- \* Shutting newspapers and broadcast stations.
- \* Forced publication of adverse court orders.

The hazards of attempting to project American libel principles abroad are graphically illustrated in Glasser’s chart covering this question: Is truth a defense to libel? Of the 19 countries surveyed, four deny this defense to a publisher, and six provide only a qualified defense.

Charles Glasser, a former working newsman, has for years served as Bloomberg News’ highly effective media counsel. He is eminently qualified to craft the handbook as an indispensable reference tool for the journalistic and legal professionals who seek to manage risks while getting out the news to a global audience.

Richard N. Winfield teaches comparative mass media law at Columbia Law School and American mass media law at Fordham Law School. He chairs the World Press Freedom Committee and coordinates the media-law working groups of the International Senior Lawyers project and the Central European and Eurasian Law Initiative. He was general counsel to the Associated Press for more than three decades.



LETTER FROM JOHN WHITTINGDALE, OBE MP, CHAIRMAN, CULTURE,  
MEDIA AND SPORT COMMITTEE, HOUSE OF COMMONS



## Culture, Media and Sport Committee

House of Commons 7 Millbank London SW1P 3JA  
Tel 020 7219 6188 Fax 020 7219 2031 Email [cmscom@parliament.uk](mailto:cmscom@parliament.uk) Website  
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The Honorable Steve Cohen,  
Chairman, Subcommittee on Commercial and Administrative Law,  
Committee on the Judiciary,  
U.S. House of Representatives,  
Washington, DC 20515.

The Honorable Trent Franks,  
Ranking Member, Subcommittee on Commercial and Administrative Law,  
Committee on the Judiciary,  
U.S. House of Representatives,  
Washington, DC 20515.

20 April 2009

Dear Congressman Cohen, Dear Congressman Franks,

The Culture, Media and Sport Committee at the House of Commons recently held a useful meeting with Matthew Wiener and staff of the Committee on the Judiciary where we discussed libel tourism and the activities of our respective Committees in this area.

As discussed with Matthew I thought it would be useful if I wrote to you to set out the details of current inquiry. Our Committee is undertaking an inquiry entitled "Press standards, privacy and libel". In addition to libel tourism our terms of reference of the inquiry cover a number of matters, including the effectiveness of the UK self-regulatory press standards regime as overseen by the Press Complaints Commission, the effect of the Human Rights Act on press freedom, and the impact of court rulings in a number of recent cases including that of press reporting of the disappearance of Madeline McCann. I enclose a copy of our call for evidence with this letter.

We have received a wide range of written submissions to the inquiry, which are available on our website at

<http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcmums/memo/press/contents.htm>. We have also heard oral evidence from a range of witnesses, including leading lawyers who represent claimants and defendants, working journalists, the Press Complaints Commission, Max Mosley and Gerry McCann. The Parliament Archive holds either audio or visual webcasting of the sessions at <http://www.parliamentlive.tv/Main/Archive.aspx> and uncorrected transcripts are available at <http://www.publications.parliament.uk/pa/cm/cmcmums.htm#uncorr>.

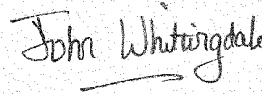
The Committee recently visited Washington DC, New York City and Albany and met with Congress Members as well as the UN Committee on Human Rights, authors, journalists and editors.

The Committee has a programme of further oral evidence planned until June. Details of witnesses have not yet been announced but I can tell you that witness will include the Editors of the Daily Mail and the News of the World, the Judiciary and the relevant

Government Ministers from the Ministry of Justice and the Department of Culture, Media and Sport. The Committee plans to publish a report on this matter by the Summer Recess at the end of July, and the Government will have two months to respond to our recommendations.

I do hope the submissions we have received and oral evidence we have heard are of interest to you. Our Committee would also be very pleased to hear more about your work in this area, and progress with the two bills concerning libel tourism which are currently before Congress.

Yours sincerely,

A handwritten signature in black ink that reads "John Whittingdale". The signature is written in a cursive style with a horizontal line underneath the name.

**John Whittingdale OBE MP**  
Chairman



## Culture, Media and Sport Committee

### Select Committee Announcement

Committee Office  
House of Commons, London, SW1A 0AA

18 November 2008

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### PRESS STANDARDS, PRIVACY AND LIBEL: NEW INQUIRY

The Committee is announcing today a new inquiry into press standards, privacy and libel. The Committee seeks views on:

- Why the self-regulatory regime was not used in the McCann case, why the Press Complaints Commission (PCC) has not invoked its own inquiry and what changes news organisations themselves have made in the light of the case;
- Whether the successful action against the Daily Express and others for libel in the McCann case indicates a serious weakness with the self-regulatory regime;
- The interaction between the operation and effect of UK libel laws and press reporting;
- The impact of conditional fee agreements on press freedom, and whether self-regulation needs to be toughened to make it more attractive to those seeking redress;
- The observance and enforcement of contempt of court laws with respect to press reporting of investigations and trials, particularly given the expansion of the Internet;
- What effect the European Convention on Human Rights has had on the courts' views on the right to privacy as against press freedom;
- Whether financial penalties for libel or invasion of privacy, applied either by the courts or by a self-regulatory body, might be exemplary rather than compensatory; and
- Whether, in the light of recent court rulings, the balance between press freedom and personal privacy is the right one.

The Committee will also examine other areas of interest that are raised during the course of its inquiry.

Written submissions are invited from interested parties; these should be sent to Rowena Macdonald, Committee Assistant, at the address below by **Wednesday 14 January 2009**.

**Guidance on submissions**

1. Our strong preference is for submissions to be in Word or rich text format (**not** as a PDF document) and sent by e-mail to [cmscom@parliament.uk](mailto:cmscom@parliament.uk), although letters will also be accepted. Submissions sent by post should be sent to Rowena Macdonald, Committee Assistant, Culture, Media and Sport Committee, House of Commons, 7 Millbank, London SW1P 3JA. Please include a contact name, postal address and telephone number in the body of the e-mail or in the letter.

2. If the submission is from an organisation rather than an individual, it should briefly explain the nature and membership of the organisation. It is helpful to the Committee if paragraphs are numbered for ease of reference and if longer submissions include an executive summary, ideally no more than one page long. Submissions should be as short as is reasonably consistent with conveying the relevant information: for most submissions, six pages can be regarded as an appropriate maximum. Further guidance on preferred format can be found at:  
[http://www.parliament.uk/parliamentary\\_committees/witness.cfm](http://www.parliament.uk/parliamentary_committees/witness.cfm)

3. Committees make public much of the evidence they receive during inquiries, for instance by publishing submissions on the internet. If you do not wish your submission to be published, you must clearly say so. If you wish to include private or confidential information in your submission to the Committee, please contact the Clerk of the Committee to discuss this.

4. Please bear in mind that Committees do not normally investigate individual cases of complaint or allegations of maladministration.

5. Once submitted, no public use should be made of any submission prepared specifically for the Committee unless you have first obtained permission from the Clerk of the Committee.

**FURTHER INFORMATION:**

Committee Membership is as follows:

Mr John Whittingdale (Chairman) (Con) ( <i>Maldon and East Chelmsford</i> )	Alan Keen (Lab) ( <i>Feltham and Heston</i> )
Janet Anderson (Lab) ( <i>Rossendale and Darwen</i> )	Rosemary McKenna (Lab) ( <i>Cumbemauld, Kilsyth &amp; Kirkintilloch East</i> )
Philip Davies (Con) ( <i>Shipley</i> )	Adam Price (PC) ( <i>Carmarthen East and Dinefwr</i> )
Mr Nigel Evans (Con) ( <i>Ribble Valley</i> )	Mr Adrian Sanders (Lib Dem) ( <i>Torbay</i> )
Paul Farrelly (Lab) ( <i>Newcastle-under-Lyme</i> )	Helen Southworth (Lab) ( <i>Warrington South</i> )
Mr Mike Hall (Lab) ( <i>Weaver Vale</i> )	

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**Specific Committee Information:** Tel 020 7219 6188, e-mail: [cmscom@parliament.uk](mailto:cmscom@parliament.uk)

**Website:** [http://www.parliament.uk/parliamentary\\_committees/culture\\_media\\_and\\_sport.cfm](http://www.parliament.uk/parliamentary_committees/culture_media_and_sport.cfm)

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