

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
February 23, 2010

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

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

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

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

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

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

Americans of the kind of candid commentary and uninhibited information that our laws are designed to foster and protect.

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

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

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

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

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

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

followed in other countries, and this problem is much broader in scope than just the U.K. and Canada. As one country tightens its libel protections, another may just emerge as the next-best-available forum of choice for libel plaintiffs.

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

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

#