



July 15, 2010

United States Senate
Washington, DC 20510

**Re: ACLU Supports H.R. 2765 – Securing the Protection of our
Enduring and Established Constitutional Heritage Act
("SPEECH Act")**

Dear Senator:

On behalf of the American Civil Liberties Union (ACLU), its more than half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we write in support of H.R. 2765, the Securing the Protection of our Enduring and Established Constitutional Heritage Act ("SPEECH Act"), in the form of the substitute offered by Senators Leahy and Sessions and adopted earlier this week in the Senate Judiciary Committee. This bill would address the growing problem of libel tourism, whereby individuals seek libel judgments in foreign countries where libel laws do not include the same free speech protections as in the U.S. We also commend the efforts of not only Senators Leahy and Sessions, but also Senators Specter, Schumer, and Lieberman for their efforts to protect the speech rights of American authors and reporters against marginal foreign defamation claims.

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 broad forum-shopping opportunities. The distribution of a single book or just one person's viewing a statement on the Internet can be enough to make a writer subject to a foreign judgment for communications claimed to be libelous. The sharp conflict between defamation 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.¹

¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

The most egregious British libel tourism cases involve publications with only incidental circulation in the U.K., plaintiffs and defendants with only minimal connections 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 to the fact 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 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, with the court determining that it had no jurisdiction over the Saudi businessman unless and until he came to the U.S. to enforce his claim.

A free society is one in which there is freedom of speech and of the press – with a marketplace of ideas in which all points of view compete for recognition. Whether ideas are wrong or right, obnoxious or acceptable, should not be the criteria. 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. H.R. 2765 would help preserve the right of free speech by giving an individual the ability to bar enforcement of a foreign defamation judgment in this country unless the judgment holder could show that the defamation judgment would meet American First Amendment standards. The bill would require the judgment holder to prove either that the foreign defamation law met First Amendment standards or that the facts underlying the judgment would constitute defamation under domestic 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 2008 the United Nations Human Rights Committee recommended that the United Kingdom revise its libel laws to bring them into accord with international standards.

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

that a State party's unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest.²

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.

Since the time of that U.N. report, support has grown within Britain to respond to the international disparagement by modifying its defamation laws.³ National political figures have offered proposals to change the law.⁴ Most recently, one British court wrote harshly of the traditional standard and entered a key ruling in favor of a man who spoke critically of the chiropractic profession.⁵

With support of international authorities and with an increasing recognition in Britain, in particular, as to the inappropriateness of lax defamation standards, we believe that passage of H.R. 2765 in the form of the Leahy/Sessions substitute 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. While a measure requiring compliance with an accepted international standard would acknowledge that there are other ways to achieve true freedom of speech, the standard set forth in H.R. 2765 is a strong step toward forcing compliance with the U.N. recommendation. 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.

We urge you to support this important legislation when it comes to the floor. If you have any questions, please contact Michael W. Macleod-Ball at 202-675-2309 or by email at mmacleod@dcaclu.org.

Sincerely,



Laura W. Murphy
Director, Washington Legislative Office



Michael W. Macleod-Ball
Chief Legislative and Policy Counsel

² 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).

³ Sarah Lyall, *Britain, Long a Libel Mecca, Reviews Laws*, N.Y. TIMES, Dec. 11, 2009, at A1, available at http://www.nytimes.com/2009/12/11/world/europe/11libel.html?_r=1&hp.

⁴ Jeremy Hodges, *Ministry of Justice Rolls Out New Measures to Reform U.K. Libel Law*, LEGAL WEEK, Mar. 25, 2010, available at <http://www.law.com/jsp/article.jsp?id=1202446741708>.

⁵ Karen McVeigh, *Science Writer Simon Singh Wins Libel Appeal After 'Orwellian Nightmare'*, GUARDIAN (London), Apr. 2, 2010, at 3, available at <http://www.guardian.co.uk/uk/2010/apr/01/science-writer-wins-libel-appeal>.