



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:

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LIBERTIES UNION  
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TREASURER

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).

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

Sincerely,

A handwritten signature in black ink, appearing to read 'Caroline', written in a cursive style.

Caroline Fredrickson  
Director, Washington Legislative Office

A handwritten signature in black ink, appearing to read 'Michael W. Macleod-Ball', written in a cursive style.

Michael W. Macleod-Ball  
Chief Legislative and Policy Counsel