

Testimony of Rep. Peter T. King

Subcommittee on Commercial & Administrative Law Hearing on Libel Tourism

Thursday, February 12, 2009 at 11:00AM

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.