Backgrounder

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Combating Libel Tourism: Federal Efforts Needed

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"Libel tourism" is the exploitation of foreign countries' permissive libel laws and weak speech protections to circumvent American authors' First Amendment rights. The technique is particularly favored by those who are linked to terrorist groups and government corruption.

By suing in forums such as the United Kingdom, these plaintiffs can suppress publications and win enormous judgments, even for works that were never published in or targeted at the forum country. Especially in areas of paramount international interest—terrorism, crony capitalism, and the spread of radical Islam—reporting and analysis are subject to the chilling effect of foreign libel law, against which American constitutional safeguards are unavailing, even within U.S. borders.

Ensuring that domestic debate on matters of public importance remains "uninhibited, robust, and wide-open" requires a federal response.

First, to free American authors from the specter of abusive foreign libel judgments that fail under the First Amendment, Congress should follow the lead of several states and deny these judgments enforcement in domestic courts.

Second, to deter libel tourism, Congress should allow the targets of such libel suits to seek damages in American courts.

But the law and the courts can accomplish only so much in the realm of foreign policy. Ending libel tourism will require vigorous diplomatic action to

Talking Points

- The First Amendment is unique. While the United States protects free speech, other countries increasingly are emphasizing "tolerance" through the suppression of controversial or offensive speech and broad libel laws.
- These laws have empowered a class of libel tourists—terrorist associates and allies, corrupt politicians, and others seeking to avoid the sunlight of free speech—to suppress their critics, even when those critics have no ties to the countries where they are sued.
- Congress should adopt a two-step approach to restore American authors' First Amendment rights. To protect speech rights, abusive foreign libel judgments should be unenforceable in U.S. courts; to deter libel tourism, the law should provide harsh damages against those who bring abusive libel suits.
- The law and the courts, however, can accomplish only so much. Diplomacy will be required to convince foreign nations that free speech is in their interest and is their citizens' natural right.

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The U.S. and the Rest

The First Amendment is unique. At a time when other countries and international institutions are placing increased emphasis on "tolerance" through the suppression of controversial or offensive speech, the United States continues to protect its citizens' fundamental right to speak freely.

In American courts, libel plaintiffs must clear a particularly high hurdle: The plaintiff must prove that a statement was false and that it was made with "actual malice" or recklessly, if concerning a public figure like a politician, or negligently, if concerning a private figure. Thus, in American courts, truth precludes liability for libel, and the plaintiff bears the burden to prove falsity. And in no case may the plaintiff restrain publication during litigation.

No other country in the world provides comparable protections for speech that harms reputation, including America's common-law brethren. In the United Kingdom, for example, a statement that harms an individual's reputation—whether a statement of opinion or fact—is enough to make out a claim for libel. The defendant then bears the burden of proving that the statement is true or was a "fair comment"—that is, that an opinion was premised on facts and made without malice.

Still other countries have harsher laws on the books that make Britain's seem the epitome of enlightenment thinking. In Canada and an increasing number of jurisdictions, for example, even truth is no defense to charges that speech has caused offense to a religious or other minority group.

A Flood of Cases

Globalization, often a liberating force, has empowered these illiberal libel regimes. A few examples:

- Rachel Ehrenfeld, who researches Islamic terrorism, faced libel charges in Britain for a book on terrorist financing that had not been published or distributed there. She declined to shoulder the great expense of defending herself there, and the court awarded her opponent, Saudi financier Khalid bin Mahfouz, $250,000 in damages. Mahfouz brags that he has used legal intimidation to silence dozens of others, including the Cambridge University Press, which opted to destroy all copies of the book *Arms for Jihad* rather than mount a defense in court.
- As media attorney Laura Handman has described, *The Washington Times* is currently defending a libel suit in Britain over its coverage of a Pentagon report on contracting in Iraq, despite the fact that the newspaper is not sold in Britain.
- Humayun Mirza, a U.S. citizen, was forced to destroy the first edition of his biography of his father, Pakistan's first president, and modify the book after his stepmother threatened to bring a libel action in Britain. His lawyers concluded that the suit would be impossible to defend, given the difficulty of proving the truth of recollections based on first-hand impressions from decades ago.
- *Forbes* magazine opted to retract claims about Russian "oligarch" Boris Berezovsky rather than defend libel claims in Britain.
- The Danish tabloid *Ekstra Bladet* faces litigation in Britain over articles criticizing an Icelandic investment bank's advice about tax shelters. The tabloid is not distributed in Britain, though it does offer English translations of some articles on its Web site.
- A Tunisian businessman with alleged ties to terrorism won a $325,000 judgment in Britain against Al Arabiya, a Dubai-based satellite network, for its reporting on his activities.

The result of cases like these, and the surely larger number of unreported settlements in similar cases, has been a chilling effect felt even by American authors and publishers who do not intend to publish their works in Britain.

Federal Response Needed

Though two states, New York and Illinois, have passed laws limiting the enforceability of foreign libel judgments, only federal law can provide a consistent nationwide approach that puts potential libel plaintiffs on notice that their abusive claims will not be recognized in U.S. courts. This is also an appropriate role for the federal government, given its responsibility for conducting foreign affairs and regulating foreign commerce.

To combat libel tourism effectively, any law must satisfy two objectives.

First, it must protect the victims—those who are subject to abusive foreign libel judgments—from enforcement of those judgments. Damage awards are, as Ehrenfeld has put it, like a Damocles sword hanging over the heads of those who are subject to them. Such victims never know when they will be forced to hire attorneys and defend themselves, often for the second time, at great personal effort and expense. In the meantime, the judgments can affect their credit ratings and access to credit, business dealings, and ability to distribute their work that is otherwise protected by the First Amendment.

While the United States cannot void such judgments or change the laws under which they were rendered, Congress can simply deny their enforcement in U.S. courts.

Second, the law should create disincentives to abuse foreign jurisdictions' libel laws as a means of stifling American authors' expressive rights. Legal threats intended to silence and intimidate and to chill speech should not be cheap, as they too often are today. They should come at great expense to guard against the risk of abuse, which (as recent events demonstrate) can be more damaging than unredressed libel itself.

Again, the United States cannot force other nations to impose the penalties necessary to achieve this effect, but it can impose them here, domestically, as many states have in the form of anti-SLAPP (strategic lawsuit against public participation) laws. This limited reach will, however, necessarily underdeter; to compensate for that shortcoming and achieve proper deterrence, the penalties must be harsh.

Protecting Sovereignty

An anti-libel tourism law should not apply, however, to all foreign libel judgments against American authors. Two factors must limit its reach.

The first is the right of sovereign nations to regulate conduct that is domestic to them. While laws that unnecessarily restrict freedom of expression are always odious—and the United States should use its diplomatic influence to press for their amendment on human-rights grounds—nations do have the power to enact and enforce such laws within their territories. This power is a fundamental trapping of sovereignty and is essential to the rule of law. Thus, an individual who publishes an allegedly libelous work in Britain or intentionally distributes such a work there should have to answer to Britain's libel laws, just as a manufacturer would have to answer to the tort law of a country where it sells products.

Nations abuse this power, however, when they apply such laws to conduct that is extraterritorial in nature, such as publications and broadcasts that were not intended for their markets and have only a *de minimis* presence in them. For example, an author who has published a book in the United States or elsewhere and has made no attempt to target a foreign country should not be at the mercy of its laws and courts just because there was some incidental or unintentional contact with that jurisdiction. That publication should be—and was under traditional notions of jurisdiction—beyond the reach of that country's law. Ignoring this distinction would compound the problem that is at the root of libel tourism: wielding the law of one country against conduct that occurs in another.

Though the Internet complicates this analysis somewhat—material published online for American audiences can be accessed in Britain as well—traditional "minimum contacts" analysis, with its focus on intent, both actual and implied, has proved flexible enough to distinguish properly between incidental contacts and intentional contacts that properly establish submission to a jurisdiction's laws.

Second is the power and reach of the courts—that is, their jurisdiction. A foreign libel plaintiff must have some contact with the United States—whether business dealings, a residence, physical presence, or the institution of a lawsuit—to be within the reach of U.S. judicial processes.

So-called extraterritorial jurisdiction is a cudgel that has been increasingly wielded against U.S. officials by foreign states that protest America's role in the world and seek to use their courts and dubious "human rights" laws to influence American foreign policy. Unless crafted with careful attention to traditional principles of jurisdiction, an anti-libel tourism law could inadvertently lend support to this

practice. It might also violate the Constitution's guarantees of due process.

A Promising Approach

The Free Speech Protection Act of 2009 (S. 449) takes the general approach described above.

First, it provides for a declaratory action by which a victim of libel tourism may bar enforcement of a foreign libel award for speech that would not constitute defamation under U.S. law. This "shield" would protect victims from the domestic enforcement of improper judgments. Although this provision arguably restates current law, in that most states would be likely to prevent the enforcement of such judgments on public policy grounds, formulating a clear, national standard would provide superior protection by reducing uncertainty and legal risk.

Second, the bill provides for treble damages in addition to all costs and legal fees attributable to the abusive libel action in cases where the libel plaintiff sought to suppress the victim's constitutionally protected expressive rights. This "sword" would cause some potential libel plaintiffs to think twice before suing, thereby deterring abuses.

The legislation fails to grapple, however, with the important issues of sovereignty and extraterritorial jurisdiction. It would apply, for example, when an author has willingly subjected himself to a foreign nation's law, such as by publishing there. Further, it asserts jurisdiction over those whose contacts with the United States are quite limited, including the service of process for a foreign libel suit in the United States.

Congress can correct these shortcomings without significantly undermining the legislation's effectiveness. To show appropriate respect for other sovereigns, the cause of action established by the legislation should be unavailable when the libel defendant has willingly subjected himself to the law of a foreign jurisdiction under a minimum-contacts analysis.

Additionally, to avoid the dangers of assertion of extraterritorial jurisdiction, the legislation should rely, as nearly all federal actions do, on venue states' jurisdictional laws, many of which are coextensive with federal constitutional limits of due process. Achieving this result is simple: Congress could simply strike the bill's jurisdictional provision.

Protecting Man's Natural Rights

Americans' First Amendment rights are meaningless if they are subject to infringement under the laws of other nations that provide only weak protection to freedom of expression. Fortunately, Congress has the power to protect these rights domestically and to deter some of the worst intrusions of foreign libel law into domestic affairs.

Legislation alone, however, will not be enough to stamp out libel tourism. Achieving that end will require a concerted diplomatic effort to convince other nations that free and vigorous debate is among man's natural rights and is essential to a secure and prosperous society.

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