Testimony of

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"Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights?"
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Chairman Leahy, Ranking Member Sessions, and Members of the Committee, thank you for inviting me here this morning, and thank you for addressing this issue today.

For the past 15 years, I have been advising publishers, authors and technology companies on how to continue to publish the robust news and information that Americans deserve, and that our First Amendment protects, in an era when publishers can be sued in foreign jurisdictions that do not protect free expression simply because their work can be accessed through the Internet. The issues you are addressing today can help to preserve the vitality of the First Amendment in an internationally networked world.

In countries quite literally from A to Z -- from Australia to Zimbabwe -- courts, litigants and prosecutors have pursued distant authors based on Internet publications intended for the authors' local readers. From my vantage point, it seems clear that the potential for being sued or prosecuted on the basis of an online publication does, in fact, chill the exercise of essential First Amendment freedoms. This chill can result in self-censorship, in decisions not to publish, and in decisions to review and assess American content based on legal standards that are less protective of free expression than our laws. This chilling effect can undermine the search for truth that our First Amendment demands, in areas that are as essential to our national security as terrorism. As Senator Specter has said, "freedom of expression of ideas, opinions, and research, and freedom of exchange of information are all essential to the functioning of a democracy, and the fight against terrorism." That freedom is endangered by libel tourism.

Some ask whether publication of sensitive matters really would be chilled, given that U.S. courts have refused to enforce judgments rendered by foreign courts applying laws that do not comply with our constitutional standards. In Bachchan v. India Abroad Publications Inc., for example, a New York state trial court noted that England lacks an equivalent to the First Amendment and concluded "[t]he protection to free speech and the press embodied in that amendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution." Given this view, shouldn't U.S. authors publish to the world just as they publish to America, and simply rely on U.S. courts to refuse to enforce any foreign judgments that result?

The answer, sadly, is that the very act of rendering a foreign judgment has immediate and damaging effects on the publisher or author who is sued, before a judgment is ever enforced - and, in many cases, even if it is never enforced. The impact of the sword of Damocles is not that

it falls, but that it hangs.

The United Nations Human Rights Committee has recognized these same chilling effects. In a 2008 Report, the Human Rights Committee expressed its concern that the United Kingdom'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 Human Rights Committee further noted 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."

Just as in all First Amendment analysis, proving a chill is a challenge. We cannot know for certain when punches have been pulled, when stories have been killed, and when manuscripts have been left unpublished. There are, however, a few concrete examples.

In 2006, the Cambridge University Press, surely one of the most prestigious and well-funded publishers in the world, received a libel claim for a book by American professor Robert Collins and former State Department official J. Millard Burr entitled Alms for Jihad: Charity and Terrorism in the Islamic World. The libel plaintiff was a Saudi billionaire, Sheik Khalid bin Mahfouz, who claimed the book defamed him by linking him to the funding of terrorism. Rather than mount a spirited defense, Cambridge University Press folded and settled with Sheik bin Mahfouz -- it simply couldn't afford the litigation. In 2007, it not only ceased publishing the book, but shredded all unsold copies. It asked all libraries that had purchased the book to destroy it. The American Library Association advised libraries not to pulp the book. "Unless there is an order from a U.S. court, the British settlement is unenforceable in the United States, and libraries are under no legal obligation to return or destroy the book," its Office of Intellectual Freedom stated in a release. "Given the intense interest in the book, and the desire of readers to learn about the controversy firsthand, we recommend that U.S. libraries keep the book available for their users." If even the Cambridge University Press cannot stand up to well-financed libel tourists, how can other publishers truly be expected to do so?

The National Endowment for Democracy's Center for International Media Assistance published just last month an excellent report entitled Libel Tourism: Silencing the Press Through Transnational Legal Threats. In the report, investigative journalist Drew Sullivan traces the chilling effect of transborder libel litigation around the world, and the examples of investigative journalists buckling under the pressure of litigation are telling.

There is no doubt that even foreign defamation judgments that are not enforced can cause real damage to U.S. authors who are sued abroad. The Ehrenfeld v. bin Mahfouz case is illustrative. The same billionaire who conquered the Cambridge University Press and sued almost 40 other publishers, Sheik bin Mahfouz, obtained a default judgment against Dr. Rachel Ehrenfeld in the United Kingdom, including damages, legal fees, a "declaration of falsity," an order directing Dr. Ehrenfeld and her publisher to publish an apology, and an injunction against the further publication of the challenged statements. This foreign judgment may impede Dr. Ehrenfeld from obtaining future publishing contracts, as publishers typically carry insurance policies requiring them to review the liability risks of works they consider for publication, and they may shy away from an author subject to such a foreign judgment. Dr. Ehrenfeld told a New York court that publishers who accepted her work in the past declined to do so after the English judgment.

Foreign libel judgments, especially those accompanied by a "declaration of falsity," also impose reputational harms on authors and publishers. No author or publisher wants to be tarred with the brush of a defamation judgment. This is especially true if that judgment states that the author or

publisher published statements deemed by a court to be untrue. Unless a United States author is provided with a mechanism to challenge the foreign judgment on his or her own initiative, the foreign libel plaintiff can deprive the author or publisher with an opportunity to vindicate his or her reputation.

These chilling effects are not merely side effects of a foreign defamation judgment. Instead, they may be the prime motivation for filing suit in a foreign country with lesser protections for freedom of expression. Again, the Ehrenfeld case is illustrative. When he sued Dr. Ehrenfeld, Sheik bin Mahfouz was a financier and billionaire with business interests around the world. The money judgment he obtained in his English lawsuit against Dr. Ehrenfeld, although a huge burden for Dr. Ehrenfeld, would be less than rounding error to a man of Sheik bin Mahfouz's staggering wealth. Instead, the greatest benefits of this judgment to a plaintiff such as Sheik bin Mahfouz are the English court's "declaration of falsity" and injunction.

Indeed, a foreign libel plaintiff may never seek enforcement of the judgment obtained in the foreign court, especially if the plaintiff knows that a United States court will refuse to enforce it. Instead, the libel plaintiff simply wants to use it to chill criticism. For example, Sheik bin Mahfouz took no action to enforce the default judgment he obtained against Dr. Ehrenfeld (but refused to disclaim is his right to enforce it in the future) and maintains a website where he has posted information about the suit he brought against her and suits he has brought against other authors and publishers. The website also contains a warning designed to chill future criticism of him: "Khalid bin Mahfouz and his family reserve their rights against the authors, editors, publishers, distributors and printers of these publications [and] they expressly reserve their rights against any person or entity which repeats any of the erroneous allegations contained in these or any other publications."

This chilling effect not only jeopardizes individual members of the media, but also impedes the crucial free flow of information and ideas to the American public on matters of public concern. Foreign litigation against United States publications and authors constitutes a clear threat to the ability of the American press to vigorously investigate and publish news and information about the most crucial issues before the American public. If a member of the media may be sued in any country in which a handful of individuals have accessed or purchased a work, the media loses the important ability to predict which country's laws will apply to the work. In such a situation, an author or publisher may have no choice but to tailor the work to the standards of the nations that afford the weakest protections for free expression. It will not matter than the speech being curtailed would be protected in the United States.

This chill damages not only the free flow of protected speech to Americans. If the process continues and publishers continue to take efforts to limit the ability of their speech to be accessed outside of the United States, the rest of the world will no longer have access to the robust American investigative journalism that often is the only light being shed on despotic regimes and corrupt governments.

Under current law, most American authors and publishers must wait for the foreign plaintiff to take action enforcing the judgment in the United States. This limitation permits the foreign plaintiff to use that foreign judgment to chill future criticism while also ensuring that a United States court will not have jurisdiction over him to declare the judgment unenforceable. Some American authors in now have the right to bring actions in state courts, thanks to statutes adopted by a few states in the past two years. But this is a national - indeed international - problem that calls out for a national solution.

Will legislation within the United States solve this problem entirely? To be sure, it would only be

a step. International law reform also will be essential, and the process of obtaining that reform will be a significant project (which I describe in an article that I have submitted for the record). This Committee can move this law-reform process ahead by continuing to focus on this issue, and to consider meaningful legislation that will permit U.S. authors, journalists and publishers to take positive action to ameliorate some of the most damaging aspects of having to deal with foreign litigants. It is an essential first step, and I am gratified that the Committee is considering it.

Thank you again for your time today, and I would be pleased to respond to any questions you have.