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Text of S. 449: Free Speech Protection Act of 2009

This version: Introduced in Senate. This is the original text of the bill as it was written by its sponsor and submitted to the Senate for consideration. This is the latest version of the bill available on this website.

S 449 IS

111th CONGRESS

1st Session

S. 449

To protect free speech.

IN THE SENATE OF THE UNITED STATES

February 13, 2009

Mr. SPECTER (for himself, Mr. LIEBERMAN, and Mr. SCHUMER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To protect free speech.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Free Speech Protection Act of 2009'.

SEC. 2. FINDINGS.

Congress finds the following:

- (1) The freedom of speech and the press is enshrined in the first amendment to the Constitution of the United States.
- (2) Free speech, the free exchange of information, and the free expression of ideas and opinions are essential to the functioning of representative democracy in the United States.
- (3) The free expression and publication by journalists, academics, commentators, experts, and others of the information they uncover and develop through research and study is essential to the formation of sound public policy and thus to the security of the people of

the United States.

(4) The first amendment jurisprudence of the Supreme Court of the United States, articulated in such precedents as *New York Times v. Sullivan* (376 U.S. 254 (1964)), and its progeny, reflects the fundamental value that the people of the United States place on promoting the free exchange of ideas and information, requiring in cases involving public figures a demonstration of actual malice, that is, that allegedly defamatory, libelous, or slanderous statements about public figures are not merely false but made with knowledge of that falsity or with reckless disregard of their truth or falsity.

(5) Some persons are obstructing the free expression rights of United States persons, and the vital interest of the people of the United States in receiving information on matters of public importance, by first seeking out foreign jurisdictions that do not provide the full extent of free-speech protection that is fundamental in the United States and then suing United States persons in such jurisdictions in defamation actions based on speech uttered or published in the United States, speech that is fully protected under first amendment jurisprudence in the United States and the laws of the several States and the District of Columbia.

(6) Some of these actions are intended not only to suppress the free speech rights of journalists, academics, commentators, experts, and other individuals but to intimidate publishers and other organizations that might otherwise disseminate or support the work of those individuals with the threat of prohibitive foreign lawsuits, litigation expenses, and judgments that provide for money damages and other speech-suppressing relief. Such actions are intentional tortious acts aimed at United States persons, even though the harmful conduct may have occurred extraterritorially.

(7) The governments and courts of some foreign countries have failed to curtail this practice, permitting lawsuits filed by persons who are often not citizens of those countries, under circumstances where there is often little or no basis for jurisdiction over the United States persons against whom such suits are brought.

(8) 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, in order to avoid the Supreme Court's first amendment jurisprudence and frustrate the protections it affords United States persons.

(9) The United States persons against whom such suits are brought must consequently endure the prohibitive expense, inconvenience, and anxiety attendant to being sued in foreign courts for conduct that is protected under the first amendment, or decline to answer such suits and risk the entry of costly default judgments that may be executed in countries other than the United States where those individuals travel or own property.

(10) Journalists, academics, commentators, experts, and others subjected to such suits are suffering concrete and profound financial and professional damage for engaging in conduct that is protected under the Constitution of the United States and essential to informing the people of the United States, their representatives, and other policymakers.

(11) In turn, the people of the United States 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.

(12) 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 the people of the United States in connection with speech that occurs, in whole or in part, in the United States.

SEC. 3. FEDERAL CAUSE OF ACTION.

(a) Cause of Action- Any United States person against whom a lawsuit is brought in a foreign country for defamation on the basis of the content of any writing, utterance, or other speech by that person that has been published, uttered, or otherwise primarily disseminated in the United States may bring an action in a United States district court specified in subsection (f) against any person who, or entity which, brought the foreign lawsuit if--

(1) the writing, utterance, or other speech at issue in the foreign lawsuit does not constitute defamation under United States law; and

(2) the person or entity which brought the foreign lawsuit serves or causes to be served any documents in connection with such foreign lawsuit on a United States person.

(b) Jurisdiction- The district court shall have personal jurisdiction under this section if, in light of the facts alleged in the complaint, the person or entity bringing the foreign suit described in subsection (a) served or caused to be served any documents in connection with such foreign lawsuit on a United States person with assets in the United States against which the claimant in the foreign lawsuit could execute if a judgment in the foreign lawsuit were awarded.

(c) Remedies-

(1) ORDER TO BAR ENFORCEMENT AND OTHER INJUNCTIVE RELIEF- In a cause of action described in subsection (a), if the court determines that the applicable writing, utterance, or other speech at issue in the underlying foreign lawsuit does not constitute defamation under United States law, the court shall order that any foreign judgment in the foreign lawsuit in question may not be enforced in the United States, including by any Federal, State, or local court, and may order such other injunctive relief that the court considers appropriate to protect the right to free speech under the first amendment to the Constitution of the United States.

(2) DAMAGES- In addition to the remedy under paragraph (1) and if the conditions for release under that paragraph are satisfied, damages shall be awarded to the United States person bringing the action under subsection (a), based on the following:

(A) The amount of any foreign judgment in the underlying foreign lawsuit.

(B) The costs, including reasonable legal fees, attributable to the underlying foreign lawsuit that have been borne by the United States person.

(C) The harm caused to the United States person due to decreased opportunities to publish, conduct research, or generate funding.

(d) Treble Damages- If, in an action brought under

subsection (a), the court or, if applicable, the jury determines by a preponderance of the evidence that the person or entity bringing the foreign lawsuit which gave rise to the cause of action intentionally engaged in a scheme to suppress rights under the first amendment to the Constitution of the United States by discouraging publishers or other media from publishing, or discouraging employers, contractors, donors, sponsors, or similar financial supporters from employing, retaining, or supporting, the research, writing, or other speech of a journalist, academic, commentator, expert, or other individual, the court may award treble damages.

(e) Expedited Discovery- Upon the filing of an action under subsection (a), the court may order expedited discovery if the court determines, based on the allegations in the complaint, that the speech at issue in the underlying foreign lawsuit is protected under the first amendment to the Constitution of the United States.

(f) Venue- An action under subsection (a) may be brought by a United States person only in a United States district court in which the United States person is domiciled, does business, or owns real property that could be executed against in satisfaction of a judgment in the underlying foreign lawsuit which gave rise to the action.

(g) Timing of Action; Statute of Limitations-

(1) TIMING- An action under subsection (a) may be commenced after the filing of the foreign lawsuit in a foreign country on which the action is based.

(2) STATUTE OF LIMITATIONS- For purposes of section 1658(a) of title 28, United States Code, the cause of action under subsection (a) accrues on the first date on which papers in connection with the foreign lawsuit described in section (a), on which the cause of action is based, are served on a United States person in the United States.

SEC. 4. APPLICABILITY.

This Act applies with respect to any foreign lawsuit that is described in section 3(a) in connection with papers that were served before, on, or after the date of the enactment of this Act.

SEC. 5. DEFINITIONS.

In this Act:

(1) DEFAMATION- The term 'defamation' means any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented a person or persons in a negative light, or have resulted in criticism or condemnation of a person or persons.

(2) FOREIGN COUNTRY- The term 'foreign country' means any country other than the United States.

(3) FOREIGN JUDGMENT- The term 'foreign judgment' means any judgment of a foreign country, including the court system or an agency of a foreign country, that grants or denies any form of relief, including injunctive relief and monetary damages, in a defamation action.

(4) FOREIGN LAWSUIT- The term 'foreign lawsuit' includes any other hearing or proceeding in or before any court, grand jury, department, office, agency, commission, regulatory body, legislative committee, or

other authority of a foreign country or political subdivision thereof.

(5) UNITED STATES- The term 'United States' means the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(6) UNITED STATES PERSON- The term 'United States person' means--

(A) a United States citizen;

(B) an alien lawfully admitted for permanent residence to the United States;

(C) an alien lawfully residing in the United States at the time that the speech that is the subject of the foreign defamation suit or proceeding was researched, prepared, or disseminated; or

(D) a business entity incorporated in, or with its primary location or place of operation in, the United States.

Departures

Opinions On Current Issues In Aviation

Libel Tourism Is No Vacation For Americans

By Kevin Mitchell

Americans are increasingly being sued for libel in foreign countries whose laws are inconsistent with the freedom of speech granted by the U.S. Constitution. In addition to journalists and bloggers, flight crews, university researchers, analysts, business travelers and organizations that issue travel warnings, including corporate travel departments, are at growing risk.

The Free Speech Protection Act of 2009 (S.449) was introduced in the U.S. Senate in February 2009 in response to cases like the one involving Dr. Rachel Ehrenfeld, an academic who writes on terrorism and lectures all over the world. Her 2003 book, *Funding Evil*, triggered a lawsuit in the U.K. by a wealthy Saudi businessman, who claimed he was libeled in the book. The differences in American and British libel laws are substantial. For example, U.K. defendants have to prove allegations are true; in contrast, in the U.S. plaintiffs must prove allegations are false. The Saudi won a judgment of \$250,000 against Ehrenfeld; sales of her book were banned in the U.K.; and she can no longer travel there.

The Ehrenfeld suit has been just the most prominent of cases known under the general rubric "libel tourism" in which foreign nationals, claiming to be offended by something written in the U.S. by journalists, researchers or scientists, travel to pliant courts in third countries and obtain libel judgments against American defendants, even though the allegedly offensive speech would be fully protected under the U.S. Constitution. These suits can have a chilling effect on research and publishing, and on U.S. national security. The objective of S.449 is to ensure that libel judgments issued by foreign courts cannot be enforced in the U.S. unless our legal standards for libel are met.

U.S. business travel contributor for The New York Times Joe Sharkey covered a plane crash in Brazil. On Sept. 29, 2006, there was a midair collision at 37,000 feet between a Brazilian Boeing 737 and a business jet, on which Sharkey was a passenger. All 154 on the 737 died; the seven crew and passengers on the business jet made an emergency landing in the jungle. Sharkey wrote about it once he returned home in the Times and con-

ducted interviews in which he was critical of Brazil's air traffic control system. He defended the American business-jet pilots, whom Brazil quickly charged with criminal negligence.

This September, Sharkey was served with a complaint seeking \$279,850 in damages. The plaintiff in the lawsuit is Brazilian Rosane Gutjhar, who asserts that Sharkey offended her country's dignity in his writings and interviews. Sharkey did not know her or mention her name at any time. The plaintiff doesn't have to claim she was personally libeled, only that her country was insulted. The suit is based on a Brazilian law that any citizen can claim damages for any alleged insult to the honor of Brazil in any case involving a crime — the pilots, Joseph Lepore and Jan Paladino, remain on criminal trial in Brazil, in absentia.

Gutjhar's suit is based on Sharkey's forceful reporting in the U.S. about Brazil's alleged cover-up of the causes of the crash. The accuracy of Sharkey's commentary has never been challenged. Sharkey claims that nothing he said or was alleged to have said would constitute libel in the U.S., or even come close. S.449 would address libel judgments in foreign countries where the alleged offense would not meet U.S. standards for libel.

With Sharkey's case, it's clear the scope of what constitutes libel has been broadened to include insulting the dignity of a foreign country.

The near-perfect reach of the Internet has placed Americans, their free speech and their finances in harm's way. At risk are travel managers issuing country-specific travel warnings, business travelers posting unfavorable trip reviews on social media sites, flight crews posting comments on industry bulletin boards or university researchers publishing negative reports. The Free Speech Protection Act of 2009 needs to be passed into law as soon as possible.

Kevin Mitchell is chairman of Business Travel Coalition, founded in 1994 to bring transparency to industry and government policies and practices, so that customers can influence issues of strategic importance to their organizations.

'The near-perfect reach of the Internet has placed U.S. free speech in harm's way.'

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