



BY EMAIL: JUDtestimony@capitol.hawaii.gov
Committee: Committee on Judiciary
Hearing Date/Time: Friday, February 20, 2009, 3:00 p.m.
Place: Room 325
Re: Testimony of the ACLU of Hawaii in Support of H.B. 130, Relating to Judgments

Dear Chair Karamatsu and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in support of H.B. 130, which amends the uniform foreign money-judgments recognition act with regard to defamation judgments acquired in foreign courts.

We write today to express our strong support for legislation to resolve the problem known as ‘libel tourism’. The ACLU of Hawaii is concerned with upholding the constitutional standards found in the U.S. and Hawaii Constitutions against challenges arising out of foreign laws that fall short of accepted international standards. We encourage this committee to pass H.B. 130 to protect the free speech rights of those authors and writers entitled to such protection from the chilling effect of foreign laws that fail to conform to basic international human rights agreements.

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 – directly proportionate to the scope of distribution of the 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 the U.S. Constitution’s First Amendment and its analogous provision in the Hawaii Constitution, the free speech rights give strong protection to those who discuss public figures or matters of public interest.¹

¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

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Hon. Rep. Karamatsu, Chair, JUD Committee
and Members Thereof
February 20, 2009
Page 2 of 3

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 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 to 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 Hawaii. Proposed language in H.B. 130 would help preserve the right of free speech by only rendering the foreign judgment enforceable if the foreign defamation law provides, in substance and in application, the same free speech protections guaranteed under our own constitution.

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 Hawaii 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, 2008, the United

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Hon. Rep. Karamatsu, Chair, JUD Committee
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Page 3 of 3

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.²

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. With support of such international authorities, we believe that passage of the bill 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 Hawaii to stand as a beacon for the preservation of individual free speech rights and encourages other nations to adopt similarly strong standards.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple
Staff Attorney
ACLU of Hawaii

² 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).

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