



**Digital Impersonation and Harassment
(HB 707 & HB 344)**

October 21, 2014

Overview



- Authorization
- HB 707 and HB 344
- Background
- Virginia Law
- Constitutional Issues
- Recent Case Law
- Applications of HB 707 and HB 344
- Summary
- Policy Options

Authorization



- House Bill 707 and House Bill 344 were introduced by Delegate Todd Gilbert and Delegate Scott Taylor, respectively, during the Regular Session of the 2014 General Assembly.
- Both bills seek to criminalize the digital impersonation of a person with the intent to harass another person.
- Both bills were left in the House Courts of Justice Committee Criminal Law Sub-Committee, and a request was sent to the Crime Commission for review.

HB 707



- HB 707 would make it a Class 1 misdemeanor when an individual “credibly impersonates a living individual” through or on a website “with the intent to harass, intimidate, or defraud.”
 - The term “website” includes blogs, social networking, and any other online account, or by other electronic means.
 - There is also an exception for a law enforcement officer “in the performance of his duties.”

HB 344



- HB 344 would modify the existing computer harassment crime in Va. Code § 18.2-152.7:1. The bill adds a subsection B:
 - “Any person who violates subsection A while having knowingly and intentionally assumed the identity of another living individual where a reasonable person would believe that the offender is in fact the individual whose identity is assumed is guilty of a Class 6 felony.”

Background



- One of the main concerns with any bill that criminalizes conduct involving speech is that the proposed restriction could violate the First Amendment, possibly causing the measure to be unconstitutional.
- Some lies and harassing speech can clearly be made illegal, while other lies and forms of harassment are constitutionally protected.
- Lying, which is at the heart of impersonation, has been the subject of a recent U.S. Supreme Court case.

Virginia Law



- Va. Code § 18.2-152.7:1 has been upheld by the Supreme Court of Virginia.
- However, in Barson v. Commonwealth, 284 Va. 67 (2012), the Supreme Court of Va. held that the defendant's actions did not meet the requirements of this statute.
 - Though his expletive filled emails were harassing, they did not meet the narrow definition of "obscene" as required by Va. Code § 18.2-372 and prior case law.
- The concurring opinion in Barson referenced an earlier case, Perkins v. Commonwealth, which interpreted the nearly identical language used in another statute, Va. Code § 18.2-427 (telephone harassment).

Virginia Law



- In Perkins v. Commonwealth, 12 Va. App. 7 (Va. Ct. App. 1991), the Court of Appeals for Virginia upheld a conviction for a violation of Va. Code § 18.2-427, rejecting an overbreadth challenge.
- The defendant in Perkins made several threatening and obscene phone calls.
- According to the court in Perkins, the statutory words, “**with the intent to coerce, intimidate, or harass**” are an act, and these words are modified by an additional requirement that the words be “**obscene, vulgar, profane, lewd, lascivious, or indecent language,**” which are unprotected speech. Therefore, the court stated that this limitation “removes protected speech from within the statute's sweep.”

Constitutional Issues



- In 2012, the U.S. Supreme Court decided a plurality decision U.S. v. Alvarez, where it reversed a conviction and struck down the “Stolen Valor” Act.
 - The Act made it a crime to falsely claim to have received the U.S. Congressional Medal of Honor.
 - The Court noted that the federal government had no compelling interest at stake other than punishing a lie which it could not do under the First Amendment.
- There is no clear holding in this case, as Alvarez is a plurality opinion. However, all of the Justices recognized that there are some circumstances in which lies can be punished without violating the First Amendment.

Constitutional Issues



- In his formal opinion, Justice Kennedy stated: “[w]ere this law to be sustained, there could be an endless list of subjects the National Government or the States could single out. Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.” United States v. Alvarez, 132 S. Ct. 2537, 2547 (U.S. 2012).

Constitutional Issues



- Justice Kennedy also noted other forms of unprotected speech:
 - Advocacy intended, and likely, to incite “imminent lawless action;”
 - Obscenity;
 - Defamation;
 - Speech integral to criminal conduct;
 - Fighting words; and,
 - True threats.

Constitutional Issues



- The U.S. Supreme Court has clearly ruled that lies, coupled with a category of unprotected speech, can be penalized.
 - Incidentally, Congress modified the “Stolen Valor” Act in 2013 to apply only to those who act “with intent to obtain money, property, or other tangible benefit.” 18 U.S.C.S. § 704(b).

Recent Case Law



- In a very recent case, the U.S. District Court in Southern Ohio enforced an injunction on an Ohio statute that prohibited making false statements about the voting record of a candidate or public official, or distributing information concerning an opponent that is either known to be false or done with reckless disregard for the truth. List v. Ohio Elections Comm'n, 2014 U.S. Dist. LEXIS 127382 (S.D. Ohio Sept. 11, 2014).
- In enforcing the injunction, the court noted that the statute “applies to negative but non-defamatory statements, positive false statements that do not defame, and statements that cause no harm.”

Recent Case Law



- The highest court in New York, the Court of Appeals, upheld a conviction under a criminal impersonation statute, which prohibits persons from impersonating someone “in such assumed character with intent to obtain a benefit or to injure or defraud another.” People v Golb, 23 N.Y.3d 455, 466 (N.Y. 2014).
- The court stated that injury to another’s reputation was enough to satisfy the statute’s requirement for an injury.

Recent Case Law



- In Golb, the injury to reputation was egregious to the point of possibly having a direct impact on future employment.
 - The defendant impersonated a college professor and made it seem that he had confessed to plagiarism, which could potentially have ruined his career.
- In that same case, the court also overturned the defendant's conviction for a violation of an aggravated harassment statute that penalized any communication with the intent to harass, annoy, threaten or alarm another person.
 - The court held this statute was overbroad and struck it down.

Applications to HB 707 & HB 344



- When examining HB 707 in light of applicable Virginia case law and U.S. Supreme Court decisions, it appears that because the “intent to harass, [or] intimidate” could be read as including some forms of speech that are protected; e.g. non-obscene criticisms, or reviews, the proposed statute might be vulnerable to a constitutional challenge.
- Unlike Va. Code §§ 18.2-152.7:1 and 18.2-427, there is no requirement that the speech be obscene or constitute a threat.

Applications to HB 707 & HB 344



- Regarding HB 344, adding the impersonation language in subsection B is not problematic. The operative language and conduct in subsection A has already been found not to be overbroad, and is limited in application to unprotected speech.
 - However, there could always be an “as applied challenge” to the language if innocent conduct was prosecuted under the statute.

Summary



- Both HB 707 and HB 344 punish the impersonation of another person with the intent to harass and intimidate others.
- Because both bills seek to punish certain forms of speech, the bills must fall within the permissible constitutional standards for restricting speech.
- HB 344 involves a narrow addition to Va. Code § 18.2-152.7:1 and is therefore consistent with Virginia case law that permits this type of unprotected speech to be criminalized.

Summary



- As for HB 707, the U.S. Supreme Court has indicated that lying by itself cannot be punished, but lying plus additional elements may place that speech outside of constitutional protection.
- The language in HB 707 could possibly allow protected speech to be punished.
- The “defraud” portion can clearly be made criminal conduct.
- The “intimidate” portion might be made criminal, although it may be safer to tie this action to actual or implied threats to physical safety.

Summary



- The “harass” portion of HB 707 is the most problematic.
 - Essentially creates a new form of criminal libel in Virginia.
 - One person’s “harassment” is another person’s series of repeated criticisms and complaints.
- This is the portion of the proposed statute that would be most likely to be struck down on First Amendment grounds.

Policy Options



1. Should impersonation be added to the computer harassment statute as drafted in HB 344?
2. Should the defraud element from HB 707 be inserted into subsection A of HB 344?

Policy Options



3. Should an impersonation statute be created as drafted in HB 707?
 - The “or” in line 15 could be amended with an “and” so it clearly limits the statute to the crime of “defrauding.”

4. Should additional language be added to HB 707 so that it is limited to speech that has the intent to defraud or to communicate a direct threat?

Policy Options



5. Should additional language be added to HB 707 to address “impersonation with the intent to injure?”
 - The proposed statutory language must still be tightly drawn to apply only to severe forms of injury, beyond mere hurt feelings or temporary social embarrassment.



Discussion
