

Virginia State Crime Commission

Digital Impersonation and Harassment

2014

Digital Impersonation and Harassment

Executive Summary

During the 2014 Regular Session of the Virginia General Assembly, House Bill 344, patroned by Delegate Scott Taylor, and House Bill 707, patroned by Delegate Todd Gilbert, were introduced to criminalize the online impersonation of another person with the intent to harass and intimidate others. These bills were left in the House Courts of Justice Committee, and referred by letter to the Crime Commission for review.

The primary goal of the bills was to punish certain forms of speech. Because of this subject matter, great care must be taken to ensure the bills' language falls within the permissible constitutional standards for restrictions on speech. Case law from both the Virginia appellate courts and the U.S. Supreme Court allow for criminal punishment for certain kinds of speech. However, these restrictions must be limited to forms of unprotected speech, such as threats, obscenity, and fraud. The proposed change in House Bill 344 involves a narrow addition to the existing computer harassment statute, Va. Code § 18.2-152.7:1. The new addition is consistent with existing case law that permits this type of unprotected speech to be criminalized.

The change proposed by House Bill 707, however, involves the creation of a new statute, which would criminalize the “credible impersonation” of a living individual on an Internet website, with the intent to harass, intimidate, or defraud another. The U.S. Supreme Court has indicated that lying by itself cannot be punished unless there are additional elements in the speech that place it outside of constitutional protection. The concern with the language in House Bill 707 is that it could possibly allow protected speech to be punished. The “defraud” portion of the bill’s language can clearly be made criminal conduct. The “intimidate” portion might be made criminal, although it would be more constitutionally sound to tie this action to actual or implied threats to physical safety. The “harass” portion of House Bill 707 is the most problematic, since the term “harass” covers a broad category of activity. To the extent that “harassment” includes generally protected forms of speech, such as reviews or editorials, it could end up being used as a new form of criminal libel in Virginia.

The Crime Commission reviewed House Bill 344 and House Bill 707, and the relevant case law, at its October meeting. Staff was directed to draft statutory language, similar to House Bill 707, that would be constitutional, and would still create a penalty for impersonating another with the intent to injure them or a third party. This language, in both a limited and more expansive form, along with a modified version of the language from House Bill 344, was presented at the December meeting. Three policy options were presented for consideration:

Policy Option 1: Amend the computer harassment statute, Va. Code § 18.2-152.7:1, by adding a subsection B, making the current Class 1 misdemeanor of computer harassment a Class 6 felony if it is done by someone who has assumed another’s identity. (This language is identical to House Bill 344, with the addition of the verb “defraud” added to the existing subsection A of the statute, so that a person would be guilty if he coerced, intimidated, harassed, or defrauded another person with a computer).

Policy Option 2: Create a new statute, making it a crime to impersonate another online, even if there is no obscene speech involved, but the impersonation was done with the intent to defraud, or to communicate a direct threat.

Policy Option 3: Create a new statute, identical to that proposed in Policy Option 2, but in place of making it a crime to communicate a direct threat, insert broader language of “maliciously injure another,” with such injury including “injury to character or reputation, or credit rating or score.”

After deliberation, the Crime Commission unanimously voted to endorse Policy Option 1. No motions were made for Policy Options 2 or 3. Policy Option 1 was introduced by Delegate Todd Gilbert as House Bill 1845 during the 2015 Regular Session of the Virginia General Assembly. The bill was left in the House Courts of Justice Committee.

Background

During the Regular Session of the 2014 General Assembly, House Bill 707 (HB 707)¹ and House Bill 344 (HB 344)² were introduced by Delegate Todd Gilbert and Delegate Scott Taylor, respectively. Both bills sought to criminalize the digital impersonation of a person with the intent to harass another person. These bills were left in the House Courts of Justice Committee Criminal Law Committee and a letter request was sent to the Crime Commission for review.

House Bill 707 proposed a new Class 1 misdemeanor that would punish an individual who “credibly impersonates a living individual” through or on a website “with the intent to harass, intimidate, or defraud.” The bill also defined the term “website” to include blogs, social networking sites, and any other online account, or by other electronic means. There was also an exception in this bill that would allow a law enforcement officer to impersonate a person “in the performance of his duties.”

Online impersonation was addressed in HB 344 by modifying the existing computer harassment statute, Va. Code § 18.2-152.7:1. This bill proposed the addition of a new subsection B to the existing language of the statute, which punishes any person who uses a computer or computer network to communicate threatening or obscene acts. The new language in subsection B would apply to a 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.” The new offense would be a Class 6 felony.

Legal Analysis

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. Lying, which is at the heart of impersonation, has been the subject of a recent U.S. Supreme Court case.³ Based on existing case law in Virginia and by the U.S. Supreme Court, some lies and harassing speech can clearly be made illegal, while other lies and forms of harassment are constitutionally protected.

Virginia Law

The current computer harassment statute, Va. Code § 18.2-152.7:1, has been upheld by the Supreme Court of Virginia. In Barson v. Commonwealth, the Supreme Court of Virginia held that the defendant's actions did not meet the requirements of this statute.⁴ The defendant in Barson had sent a series of expletive filled emails to his ex-wife that were deemed by the Court to be harassing. The Court found, however, that the emails did not meet the narrow definition of "obscene" as defined by Va. Code § 18.2-372 and prior case law. Because the harassing emails did not contain obscene speech, the defendant's conviction was overturned. However, the statute itself was not struck down. The concurring opinion in Barson favorably referenced an earlier case by the Court of Appeals of Virginia, Perkins v. Commonwealth, which interpreted nearly identical language used in another statute, Va. Code § 18.2-427 (telephone harassment).

In Perkins, the Court of Appeals for Virginia upheld a conviction for a violation of Va. Code § 18.2-427, rejecting an overbreadth challenge.⁵ The defendant in Perkins made several threatening and obscene phone calls, specifically threatening to rape and kill the victim's wife and to burn the victim's house down.⁶ According to the court in Perkins, the words in the statute, "with the intent to coerce, intimidate, or harass" are an act, which is then modified by specific types of speech.⁷ The speech in question in this case was deemed by the court to be either "obscene, vulgar, profane, lewd, lascivious, or indecent language," which are forms of unprotected speech.⁸ Since the speech was unprotected, the court stated that this limitation "removes protected speech from within the statute's sweep," placing the statute on firm grounds against an overbreadth challenge.⁹

Constitutional Issues

In 2012, the U.S. Supreme Court issued a plurality decision in the case of U.S. v. Alvarez, when it reversed a conviction and struck down the Stolen Valor Act.¹⁰ The Stolen Valor Act made it a crime to falsely claim to have received the U.S. Congressional Medal of Honor, as well as other medals and military honors.¹¹ 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."¹²

The Court noted that with the statute in question, the Stolen Valor Act, the federal government had no compelling interest at stake other than punishing a lie, which it could not do under the First Amendment.¹³ 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.¹⁴ In fact, Justice Kennedy noted specific forms of unprotected speech, including:

- Advocacy intended, and likely, to incite "imminent lawless action;"¹⁵
- Obscenity;¹⁶
- Defamation;¹⁷
- Speech integral to criminal conduct;¹⁸
- Fighting words;¹⁹ and,
- True threats.²⁰

The U.S. Supreme Court has clearly indicated that lies that fall into 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.”²¹

Recent Case Law

In a recent case, the U.S. District Court of 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.²² 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.”²³ Essentially, the court noted that it was not the role of the courts to determine what is a political truth or lie.²⁴

The highest court in New York, the New York 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.”²⁵ The defendant in the Golb case impersonated a number of scholars and college professors in an effort to criticize other scholars who were critical of his father’s research.²⁶ In some of the defendant’s postings he made statements pretending that a rival scholar had admitted to charges of plagiarism.²⁷ The Court stated that injury to another’s reputation was enough to satisfy the statute’s requirement for an injury, and thus the conviction was upheld.²⁸ In that same case, the Court overturned the defendant’s conviction on another charge involving New York’s aggravated harassment statute, which penalized any communication with the intent to harass, annoy, threaten or alarm another person.²⁹ The Court held this statute was overbroad and struck it down.³⁰

Applications to HB 707 and HB 344

When examining HB 707 in light of applicable Virginia case law and United States Supreme Court decisions, there is the possibility that if enacted, it could be held to be constitutionally overbroad. Because the phrase “intent to harass, [or] intimidate” does not specifically modify forms of unprotected speech, and because it does not necessarily involve obscene speech or threats, it could be read to include some forms of speech that are protected, such as non-obscene criticisms, or reviews. Unlike Va. Code §§ 18.2-152.7:1 (computer harassment) and 18.2-427 (telephone harassment), there is no requirement that the speech be obscene or constitute a threat. Without this limitation, consistent with the holding in Perkins, the proposed statute might be vulnerable to a constitutional challenge.

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 the statute is limited in application to unprotected speech. However, there could always be an “as applied challenge” to the language of the proposed subsection, if innocent conduct was prosecuted under the statute. An example would be a prosecution that was initiated against a person who posted what was clearly a parody on a website.

Summary

Both HB 707 and HB 344 seek to punish the impersonation of another person with the intent to harass and intimidate others. Because both of these bills seek to punish certain forms of speech, the bills must fall within the permissible constitutional standards for restrictions on speech.

Virginia and U.S. Supreme Court decisions do allow for criminal sanctions regarding speech, but such offenses must be limited to unprotected forms of speech, such as threats, obscenity, and fraud. House Bill 344 involves a narrow addition to existing 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. 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 and therefore would be at risk of being struck down if passed as initially written. The “defraud” portion of HB 707 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. The “harass” portion of HB 707 is the most problematic, and essentially creates a new form of criminal libel in Virginia.

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¹ H.B. 707, 2014 Gen. Assem., Reg. Sess. (Va. 2014).

² H.B. 344, 2014 Gen. Assem., Reg. Sess. (Va. 2014).

³ United States v. Alvarez, 132 S. Ct. 2537 (U.S. 2012).

⁴ Barson v. Commonwealth, 284 Va. 67 (2012).

⁵ Perkins v. Commonwealth 12 Va. App. 7 (Va. Ct. App. 1991).

⁶ Id.

⁷ Id. at 10.

⁸ Id. at 11.

⁹ Id.

¹⁰ United States v. Alvarez, 132 S. Ct. 2537 (U.S. 2012).

¹¹ 18 U.S.C.S. § 704(b).

¹² *Supra* note 10 at 2547.

¹³ Id.

¹⁴ Id.

¹⁵ Brandenburg v. Ohio, 395 U.S. 444 (U.S. 1969).

¹⁶ Miller v. California, 413 U.S. 15 (U.S. 1973).

¹⁷ New York Times Co. v. Sullivan, 376 U.S. 254, 256 (U.S. 1964).

¹⁸ Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 492 (U.S. 1949).

¹⁹ Chaplinsky v. N.H., 315 U.S. 568, 569 (U.S. 1942).

²⁰ Watts v. United States, 394 U.S. 705 (U.S. 1969).

²¹ 127 Stat. 448 (2013).

²² List v. Ohio Elections Comm'n, 2014 U.S. Dist. LEXIS 127382 (S.D. Ohio Sept. 11, 2014).

²³ Id.

²⁴ Id.

²⁵ People v Golb, 23 N.Y.3d 455 (N.Y. 2014).

²⁶ Id. at 461.

²⁷ Id. at 462-63. In the world of academia, if a professor were to admit to having committed plagiarism, it would have extremely severe repercussions on the rest of his career—possibly including his being unable to find a job at any institution of higher learning.

²⁸ Id. at 465-66.

²⁹ Id. at 467-68.

³⁰ Id. at 467.