WASHINGTON
LEGISLATIVE OFFICE

November 9, 2007

Remove the Unconstitutional Limits on Using Names and Images of Soldiers from the Conference Report

Re: Department of Defense Authorization, Section 582 of H.R. 1585

Dear Conferee:

On behalf of the ACLU, a non-partisan organization with over half a million activists and members and 53 affiliates nationwide, we urge you to strip Section 582 from H.R. 1585 in the conference report on the Department of Defense Authorization. While apparently well-intentioned, the prohibition imposed on using the names and images of members of the armed forces is a content-based restriction on speech that clearly violates the First Amendment.

Section 582 of H.R. 1585, added by an amendment sponsored by Representative Boren ("Boren Amendment"), would prohibit, without permission, the use of a name or image of a member, or former member, of the military in any commercial activity in a manner reasonably calculated to connect the military member with that individual's service in the armed forces. If the military member is no longer alive, then permission must first be obtained from the survivor who is at the highest level on the following list of survivors: the surviving spouse; the children; the parents; the grandparents; or the siblings. If there is more than one surviving individual at the highest level where survivors exist, *all* survivors at that level must give consent before the service member's name or likeness may be used. The Attorney General would be authorized to obtain an injunction preventing any unauthorized use.

The Boren Amendment would have wide-ranging effects. Because "commercial activity" is undefined, it could encompass news media that are advertiser supported that list the names of military members who died, such as *This Week* with George Stephanopoulos, *Nightline* with Ted Koppel, and *The Washington Post*'s "Faces of the Fallen" at washingtonpost.com, to name just a few. It could bar publication of a poignant book for sale that commemorates the sacrifice of our service members, such as Rebecca Pepin's *Faces of Freedom: Profiles of America's Fallen Heroes, Iraq and Afghanistan*. The Amendment could prevent the sale of POW-MIA bracelets with the names of service members missing in action. Without securing permission of the highest surviving family members of each of the thousands of deceased service members, important news stories, documentaries, and expressive items will be stymied.

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Core political speech also will be chilled in the face of this government censorship. The controversy giving rise to the Boren Amendment stems from an anti-war activist named Dan Frazier. Mr. Frazier sells a T-shirt stating: "Bush Lied – They Died," and lists the names of all the soldiers who lost their lives in Iraq. Some survivors of those soldiers oppose Mr. Frazier's sentiment and have sought to stifle it through legislation like the Boren Amendment.[1] A federal court has enjoined implementation of the Arizona law because of its unconstitutional burdens on core First Amendment rights.[2] The Boren Amendment suffers from similar constitutional infirmities.

The Amendment is a Content-Based Restriction on Political Speech

The First Amendment reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[3] "[T]he freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole."[4]

A content-neutral speech restriction is one that is justified without reference to the content of the regulated speech.[5] Laws that restrict political speech based on its content are presumptively unconstitutional.[6] Constitutional protections for political speech are not lost merely because the speech appears on expressive items that are sold.[7]

The Boren Amendment is a content-based restriction that squarely aims at limiting political speech. It concerns a content-based restriction on one of the most pressing issues of our day: the prosecution of the Iraq war and the toll it takes on the lives of our soldiers and their families. Under the Amendment, an injunction may be granted based solely on the content of the speech. One may express anti-war sentiments, but only without using the names or likenesses of the fallen soldiers.

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[1] The handful of states that have passed legislation like the Boren Amendment include Arizona, Florida, Louisiana, Oklahoma, and Texas.

[2] *See Frazier v. Boomsma*, CV-07-08040-PHX-NVW (D. Ariz. Sept. 27, 2007). For an electronic copy of the decision, contact jtucker@dcaclu.org.

[3] *New York Times Co. v. Sullivan*, 975 U.S. 254, 270 (1964).

[4] *Bose Corp. v. Consumers Union of U.S., Inc*., 466 U.S. 485, 503-04 (1984).

[5] *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986).

[6] *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992); *see also Regan v. Time, Inc.*, 468 U.S. 641 (1984).

[7] *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n.5 (1988).

That restriction cuts to the heart of political speech that is most protected by the First Amendment:

> Because a focal point of [a] critique of the Iraq war is the magnitude of the personal loss that it has produced, the individual identities of the deceased American soldiers are not only reasonably related to [the] message, but integral to it. [Expressive items], like the Vietnam War Memorial, derive some of their communicative force from their ability to personalize human loss on a great scale. Without the large number of real names of fallen soldiers, the effect of [that] political message would be diminished.[8]

The Boren Amendment's provision allowing use of the names and likenesses of service members if permission is first obtained does not save it from being content-based. As a federal judge recently explained in striking down an Arizona law with a similar provision,

> The law is not directly a categorical ban on speech because it permits [a third party] to use the names of the deceased soldiers if he obtains consent from each soldier's family. However, the transaction costs involved in obtaining consent from the designated family member of each soldier makes the restriction effectively indistinguishable from a flat prohibition. Given the difficulty and cost of finding, contacting, and obtaining consent from the soldiers' numerous representatives, the time when [a third party] may use the names is effectively never, the place is nowhere, the manner is nohow.[9]

Thus, the restriction is content-based, and must meet strict scrutiny in order to survive constitutional examination.

The Boren Amendment Cannot Survive Strict Scrutiny Review

To overcome the presumption of unconstitutionality, content-based restrictions must pass strict scrutiny review.[10] This test requires that the challenged statute or regulation prove necessary to serve a compelling governmental interest, and is narrowly drawn to achieve that end.[11] "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."[12] The Boren Amendment fails to survive strict scrutiny review because it is not narrowly tailored to achieve a compelling governmental interest.

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[8] *Frazier v. Boomsma*, CV-07-08040-PHX-NVW (D. Ariz. Sept. 27, 2007), slip op. at 23.

[9] *Id.*, slip op. at 21.

[10] *Turner Broad. Sys. v. FCC*, 114 S. Ct. 2445 (1994).

[11] *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).

[12] *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

Protecting Military Families in Mourning is Not a Compelling Governmental Justification for Overriding the First Amendment

While protecting military families in mourning is laudable, it cannot provide a compelling interest for the government in overriding the First Amendment. The government cannot regulate speech in order to avoid offense.[13] Some military families may disagree with the message, but that does not justify restricting the free speech rights of their fellow citizens. Indeed, engaging in speech free of censorship is one of the very rights for which our honored military dead have made the ultimate sacrifice.

Even if protection from offense was a valid governmental interest, the Boren Amendment fails strict scrutiny because it is not narrowly tailored to protect grieving military families. The Amendment is not focused on any sort of outrageous conduct, nor is it focused solely on grieving families. There is likewise no temporal limit to the Amendment, even though "the State's interest in protecting mourning families must attenuate as they come to terms with there loss."[14] Instead, it endures forever and applies to any military member who served in the armed forces since 1917. The Boren Amendment bars political speech at the core of the First Amendment. As such, it is overbroad and plainly unconstitutional.

Protecting the "Right of Publicity" is Not a Compelling Governmental Interest Where the Name or Likeness is used in Political Commentary

For similar reasons, protecting the right of publicity of the service member and their survivors, while equally commendable, likewise is not a compelling interest.

The common law right of publicity limits liability to cases where the commercial value of another person's identity is appropriated without their consent. The doctrine normally applies to people such as actors, athletes, and pundits who make their living off of their names and likenesses. The doctrine has little applicability under these circumstances. Most soldiers do not earn their living from their names. Most soldiers do not invest their time and effort cultivating an identity that is itself a source of financial reward. Only in rare cases where a soldier has an identity that carries some commercial value, perhaps someone like the late NFL star Pat Tillman, can it be said there is at least a modest publicity right to be protected.

However, even in the few cases where a publicity right might exist for a high profile soldier, it would not serve as a compelling interest justifying restrictions on core political speech. As the federal court explained in examining Arizona's attempt to restrict Mr. Frazier's sale of t-shirts listing the names of those who have died in Iraq:

> The justification for enforcing a right of publicity against Frazier is particularly weak because Frazier is not really profiting off the name of any particular deceased soldier. The primary selling point of the t-shirts is their critique of the

[13] *See generally Cohen v. California*, 403 U.S. 15, 26 (1971) ("we cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process").

[14] *Frazier v. Boomsma*, CV-07-08040-PHX-NVW (D. Ariz. Sept. 27, 2007), slip op. at 27.

> Iraq war through a personalization of the quantum of loss it has brought. Only a few individual names are actually visible in the advertisement … and the names of the individual soldiers are printed on the t-shirts in a font that cannot be read beyond arm's length. The identity of any particular soldier is not the point of the t-shirts; it is the combined effect of all the names of the 3,461 deceased soldiers. Frazier's utilization of their identities is intertwined so substantially with his own creative contributions as to dispel any conclusion that he is unjustly enriching himself at the soldiers' expense.[15]

For that reason, the interest of publicity cannot justify the restriction on Mr. Frazier's political speech associated with the use of soldiers' names or likenesses. Enforcement of the Boren Amendment or a similar state law, such as Arizona's, would not serve those interests. "There is no serious risk that viewers of the advertisements or the t-shirts will be misled to believe that the deceased soldiers or their representatives have endorsed Frazier's political message."[16]

There is obviously an inherent tension between the common law right of publicity and the First Amendment. For that reason, courts have held that the right of publicity cannot justify content-based restrictions on political or artistic expression where the name or likeness of the holder of the right of publicity bears a reasonable relationship to the message.[17] If it were otherwise, the limitations of the right of publicity rule would restrict political and other core forms of discourse, block critical avenues of self-expression, and limit the marketplace of ideas. Thus, even if the right of publicity doctrine applied, it would give way to application of the First Amendment.

The Boren Amendment is an Unconstitutional Prior Restraint

The Boren Amendment also would impose an unconstitutional prior restraint. The Amendment would authorize the Attorney General to seek an injunction to prevent any person who "is engaged or *is about to engage*" in the unauthorized use of a name or image of a service member. In that manner, the administration can shut off the most poignant political protest of military actions, such as the war in Iraq, before it takes place: namely, personalizing the costs of war by putting names and faces with the numbers of the fallen.

The Boren Amendment is the very definition of a prior restraint: a law "forbidding certain communications when issued in advance of the time that such communications are to occur."[18] The Supreme Court has concluded that "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights."[19] "Any system of prior restraints of expression comes … bearing a heavy presumption against its constitutional

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[15] *Id.*, slip op. at 25.

[16] *Id.*, slip op. at 28.

[17] 2 J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 8:91 (2d ed. 2007).

[18] *Alexander v. United States*, 509 U.S. 544, 550 (1993).

[19] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

validity."[20] For the reasons described above, the Boren Amendment cannot overcome its heavy presumption of unconstitutionality.

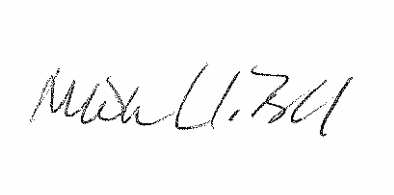
Remove the Unconstitutional Boren Amendment from the Conference Report

While the intention behind the Boren Amendment may be laudable, it is "firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[21] We share your commitment to the freedoms for which our service members and their families sacrifice so much, including freedom of speech. We urge you to defend the First Amendment against this unconstitutional attempt to muzzle political expression, and remove the Boren Amendment from the Conference Report.

If you have any questions regarding this matter, please feel free to contact Michael W. Macleod-Ball, Chief Legislative and Policy Counsel at (202) 675-2309, or James Thomas Tucker, Policy Counsel, at (202) 675-2318.

Sincerely,

Caroline Fredrickson
Director, Washington Legislative Office



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[20] *New York Times v. United States*, 403 U.S. 713, 714 (1971).

[21] *Street v. New York*, 394 U.S. 576, 592 (1969).

cc: Senate Majority Leader Harry Reid
Speaker of the House Nancy Pelosi
Senate Minority Leader Mitch McConnell
House Minority Leader John Boehner
Senate Armed Services members
House Armed Services members