WASHINGTON
LEGISLATIVE OFFICE

February 7, 2013

Dear Senator:

RE: ACLU Urges NO Vote on Grassley Substitute to S. 47, Violence Against Women Reauthorization Act of 2013

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On behalf of the American Civil Liberties Union (ACLU), a nonpartisan public interest organization dedicated to protecting the principles of freedom and equality set forth in the Constitution and in our nation's civil rights laws, we urge Senators to vote against the Grassley substitute to the Violence Against Women Reauthorization Act of 2013 (S. 47).

Although the Grassley substitute contains provisions that could help women and their families lead lives free of violence and abuse, the omission and inclusion of several other provisions raise serious concerns and lead us to oppose the amendment.

A. New Aggravated Felony under Immigration Law

Section 1005 of the Grassley substitute would prospectively make third drunk-driving convictions with a one-year sentence an "aggravated felony" under the immigration laws. This is regardless of the underlying conduct's severity, even if the state criminal conviction is for a misdemeanor (not a felony) that results in a year-long suspended sentence with no jail time served. The "aggravated felony" designation is known as the "immigration death penalty" because it subjects people to mandatory detention and mandatory deportation. Since 1996 Congress has voted only once to expand the aggravated felony definition, and that was for human trafficking.

This provision has nothing to do with the purpose of VAWA – which is to protect victims of domestic violence, sexual assault, dating violence, stalking, or human trafficking. It is wholly outside the scope of violence against women and therefore irrelevant to this critical legislation. Immigration issues that have nothing to do with violence against women should be dealt with in immigration legislation, which the Senate is poised to do this spring. VAWA is the wrong vehicle for such a provision lacking any connection to the underlying legislation.

Moreover, this provision will affect all immigrants, including lawful permanent residents who have lived in the U.S. for decades, many having U.S. citizen family members. It employs a "one-size-fits-all" approach, treating drunk-driving crimes the same even if there is no damage to persons or property. In some states a person can be convicted of DUI even if there is no attempt to drive the vehicle, such as when someone falls asleep in a parked car. This provision would also override well-settled Supreme Court case law on aggravated felony "crimes of violence." The Court has unanimously held that drunk driving does not constitute a crime of violence because "[t]he ordinary meaning of this term, combined with [the statutory definition's] emphasis on the use of physical force against another person . . . suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."[1] Enacting this provision would run contrary to the accepted legal understanding that crimes of violence exclude accidental or negligent conduct; in the Court's words, making DUI a crime of violence "would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." We oppose this section and urge its exclusion from any VAWA bill.

B. Complete Omission of Coverage for Those Who Are LGBT

The Grassley substitute would completely omit explicit coverage for the lesbian, gay, bisexual, and transgender (LGBT) community, a stark change from the language of S. 47.[2]

The LGBT-inclusive provisions in S. 47 represent a critical step forward for VAWA, ensuring that it will reach those most in need of its services, regardless of sexual orientation or gender identity. The need could not be clearer. Studies indicate that LGBT people experience domestic violence at roughly the same rate as the general population. However, it is estimated that less than one-in-five LGBT domestic violence victims receives help from a service provider and less than in one-in-ten victims reports violence to law enforcement. The Grassley amendment does nothing to address the unacceptable discrimination that LGBT people often face when attempting to access services for those who experience intimate-partner violence and nothing to change the fact that the LGBT community is underserved in this area.

We oppose this amendment and any other amendments to strike or modify protections for LGBT victims of domestic violence.

C. New Mandatory Minimum Sentences for Aggravated Sexual Abuse

Section 1004 of the Grassley substitute creates new mandatory minimum sentences for aggravated sexual abuse that occurs in special maritime and territorial jurisdiction or Federal prison. A new ten year mandatory minimum sentence could be charged in cases of sexual assault that involve force or threat, and a new five year mandatory minimum sentence could be charged in cases of sexual assault by other means.

1 Leocal v. Ashcroft, 543 U.S. 1, 11 (2004).
2 *See* Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. at § 101 (STOP Grants), §108 (Underserved Population Grants).

Additionally, Section 1007 of the Grassley substitute creates a new one year mandatory minimum sentence for the possession or distribution of child pornography.

We oppose mandatory minimum sentences because they generate unnecessarily harsh sentences, tie judges' hands in considering mitigating circumstances in individual cases, create racial disparities in sentencing, and empower prosecutors to force defendants to bargain away their constitutional rights. Mandatory minimum sentences defeat the traditional rehabilitative purposes of sentencing by taking discretion away from judges and ceding it to prosecutors who then use the threat of lengthy sentences to frustrate defendants' asserting their constitutional rights.

In October 2011, the United States Sentencing Commission ("the Commission") released its most recent report on mandatory minimum sentences. In this report, the Commission concluded that a strong and effective guideline system best serves the purposes of sentencing established by the Sentencing Reform Act of 1984, and recommended reform to mandatory sentencing. Although the Commission did not come to a consensus about mandatory minimum penalties as a whole, it unanimously agreed that certain mandatory minimum penalties apply too broadly, are excessively severe, and are applied inconsistently in the federal system.

In addition, the Chair of the Commission, Judge Patti Saris, acknowledged that mandatory minimum sentences have contributed to federal prison overcrowding, with the federal Bureau of Prisons (BOP) currently over its capacity by 37 percent.

D. Protections for Immigrant Survivors of Violence

Section 801 endangers self-petitioning victims by specifically requiring US Citizenship and Immigration Services (CIS) adjudicators to consider evidence provided by abusive spouses, including through interviews, thereby authorizing abusers to use the immigration process to perpetuate abuse. And punitively, the bill provides that if CIS finds any evidence of a "material misrepresentation," a vague term that does not account for the lack of access to legal representation and for language barriers, the victim would be permanently barred from all immigration benefits and would be removed from the U.S. on an "expedited basis." These harsh consequences could be imposed on victims based on "evidence" of a "material misrepresentation" provided by a vindictive abuser.

E. "Cyber-Stalking" Criminal Expansion

We are concerned that § 107 of the Grassley substitute amendment to S. 47 would expand the existing "cyber-stalking" law, 18 U.S.C. § 2261A (2006), in a manner that would violate the First Amendment. We recognize that perpetrators of domestic and sexual violence and stalking can use the Internet to inflict harm. However, laws addressing this problem must be narrowly tailored to target "true threats" in order to comply with the Constitution. We urge the Senate to amend section 107 of the Grassley substitute to ensure that communications protected by the First Amendment are not covered by this section.

1. Only "true threats" do not receive full First Amendment protection

Under settled law, even the most heinous and offensive speech receives full First Amendment protection, unless it falls within one of a small number of narrow exceptions.[3] Relevant to the current statute, the only threatening or intimidating speech that does ***not*** receive full First Amendment protection is the "true threat."[4] At the heart of the cases attempting to define what constitutes a true threat are the same considerations at play in cases of violent incitement. Under those cases, the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing ***imminent*** lawless action and is ***likely*** to produce such action."[5] Extending this analysis to the "true threats" doctrine, the harm from a "true threat" must be immediate and the individual making the threat must have the specific intent to threaten.

Without bright lines delineating lawful speech from unlawful "true" threats, vague or overbroad statutes criminalizing speech that could be construed as threatening or intimidating have a significant chilling effect on protected speech while simultaneously failing to cover actual "true" threats, which themselves have a chilling effect on the exercise of other constitutional rights and may be legitimately proscribed.[6] As written, section 107 of the Grassley substitute would be both vague and overbroad, and should be amended to carve out First Amendment-protected speech.

2. The Grassley substitute would inappropriately expand existing cyber-stalking law

As amended, section 107 of the Grassley substitute would significantly expand existing cyber-stalking law, codified at 18 U.S.C. § 2261A (2006), which, notably, was recently subject to a successful as-applied constitutional challenge.[7] *Cassidy* involved the posting of offensive messages on publicly accessible blogs and on Twitter, which the prosecutor argued could result in "substantial emotional distress" for the subject of the communications.[8] The comments at issue, though crude and in poor taste, were critical of a public religious figure, which raised additional First Amendment concerns. Further, and crucially, the comments were posted on what the court found to be the equivalent of a physical bulletin board, from which, unlike direct one-on-one threats, the individual targeted can "avert[] her eyes" and avoid any harm.[9]

As amended by section 107, section 2261A would provide the government even more leeway to target the kind of protected speech at issue in *Cassidy*.

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3 *Cf.* United States v. Baker, 890 F. Supp. 1375 (E.D. Mich. 1995) (finding emails containing fantasies about violence against women and girls, sent to third party, protected by First Amendment and not subject to punishment under statute criminalizing threats sent in interstate commerce).
4 Watts v. United States, 394 U.S. 705 (1969) (finding statement that, "[i]f they ever make me carry a rifle the first man I want to get in my sights in L.B.J.," in the context of a small political rally, ***not*** a "true threat" and protected under First Amendment).
5 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (emphasis added).
6 Brief for Am. Civil Liberties Union Found. of Or., Inc. as Amicus Curiae Supporting Affirmance at 3, Planned Parenthood v. Am. Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002).
7 United States v. Cassidy, 814 F. Supp. 2d 574, 576 (D. Md. 2011).
8 *Id.* at 577-78.
9 *Id.* at 585.

First, the revised statute would remove the requirement of actual harm. Under current law, the defendant must (1) travel in interstate or foreign commerce with the requisite intent, and the travel must "*[p]lace [the victim] in reasonable fear of the death of, or serious bodily injury to, or cause[] substantial emotional distress to*" *the victim or certain close family members*; or (2) use the mail, any interactive computer service or any facility of interstate or foreign commerce, with the requisite intent, "*in a course of conduct that causes substantial emotional distress to [the victim] or places [the victim] in reasonable fear of the death of, or serious bodily injury to*," the victim or certain close family members.[10] Under section 107, the amended statute would merely require that the speech be "reasonably expected to cause substantial emotional distress."[11] Accordingly, purely private speech that is ***never seen*** by the intended recipient would become criminal, as would postings in an online public forum like Twitter without any showing that the speech had any harmful effect on a third party. While the amended section does limit the specific intent requirement to "the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate," the terms "harass" and "intimidate" will still cover protected speech.

Second, section 107 would add two additional electronic facilities that, if used, could trigger the statute. Currently, § 2261A only lists "interactive computer service," which is defined in 47 U.S.C. § 230(f) as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." Section 107 would add to "interactive computer service" both "electronic communication service[s]" and "electronic communication system[s] of interstate commerce."[12] To the extent these added terms are intended to broaden the scope of the statute to online public forums like Facebook or Twitter, they must be limited to ensure that only true threats are covered, or they should be removed.[13]

3. The existing cyber-stalking statute can already be misused to violate Americans' First Amendment rights to freedom of speech, assembly, petition and press; the Grassley substitute would substantially increase the possibility of misuse

The current "cyber-stalking" statute is already subject to misuse, and has been deployed to reach public speech on matters of public importance in online public forums. Such speech is protected under the First Amendment freedoms of speech, assembly, petition and press. Section 2261A thus goes beyond punishing the "true threats" that may receive lesser First Amendment protection. Cyber-stalking laws targeting speech (as opposed to conduct) should be limited to actual "true threats," which occur only when an individual engages in communications directed at the recipient where the speaker has a *subjective* intent to cause the recipient harm.[14]

10 *See* 18 U.S.C. § 2261A(1)-(2) (2006).
11 Grassley Amendment in the nature of a substitute to the Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong., § 107(1)(B), (2)(B) [hereinafter Grassley Substitute].
12 *Id.* at § 107(2).
13 Granted, Twitter also has a "direct message" functionality, which allows for private messages between Twitter users. However, one must affirmatively "follow" the other individual in order to exchange direct messages.
14 *Cf.* Cassidy, 814 F. Supp. at 585-86 ("[I]t is questionable whether the same interest exists in the context of the use of the Internet alleged in this case because harassing telephone calls 'are targeted towards a particular victim and are received outside the public forum.' . . . Twitter and Blogs are todays' equivalent of a bulletin board that one is

The appropriate amendment to section 2261A in this case would be to limit the scope of the statute exclusively to "true threats." Instead, the Grassley substitute would unconstitutionally extend the scope of the "cyber-stalking" statute to purely public, constitutionally protected speech, including speech that is never even seen by the intended recipient and that causes no harm whatsoever.

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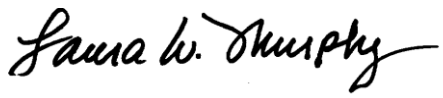
Thank you for your consideration of our views. Please don't hesitate to contact Senior Legislative Counsel Vania Leveille at 202-715-0806 or vleveille@dcaclu.org if we can be of any assistance.

Sincerely,



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free to disregard, in contrast, for example to e-mails or phone calls directed to a victim." (quoting United States v. Bowker, 372 F.3d 365, 379 (6th Cir. 2004))).