

SUBJECT: Creating offense for use of a soldier's name or likeness in advertisements

COMMITTEE: Defense Affairs and State-Federal Relations — committee substitute recommended

VOTE: 6 ayes — Corte, Escobar, Noriega, Garcia, Merritt, Raymond

0 nays

1 present not voting — Hodge

2 absent — Herrero, Moreno

WITNESSES: For — Robert C. Vandertulip. (*Registered, but did not testify:* Cyndi Taylor Krier, USAA)

Against — None

DIGEST: CSHB 331 would add Business and Commerce Code, sec. 35.64 to make it an offense for a person to use without consent the name or likeness of an active or former member of the U.S. military in an advertisement for a commercial purpose. The soldier would have to be clearly identifiable and in uniform. A violation would be subject to a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000).

An individual would be allowed to use a soldier's name or likeness with consent of the soldier if the soldier were still alive. If the soldier were not still living, an individual would need consent of:

- the soldier's surviving spouse;
- the soldier's representative, such as an executor or administrator; or
- a majority of the soldier's adult heirs, which would include grandparents, parents, siblings, children, or grandchildren.

Print and broadcast media using the name or likeness of a soldier in a news report or advertisement for that report would be exempt.

The bill would take effect September 1, 2007.

SUPPORTERS
SAY:

CSHB 331 would help protect the names and images of America's soldiers from commercial exploitation, especially those who have given their lives in the nation's defense. The bill would protect the privacy of soldiers and of grieving families and help shield them from further suffering. It would not restrict anyone's First Amendment right to free expression and would be aimed at commercial enterprises, not political speech.

In 2005, an Arizona man began selling anti-war T-shirts on his Web site using the names of fallen soldiers. The shirt listed the names of soldiers killed in Iraq and superimposed the message: "Bush Lied. They Died." Family members contacted the man selling the shirts, demanding that he remove the names of their loved ones, but the man claimed he was exercising his First Amendment rights. State legislatures in Louisiana and Oklahoma have since approved laws banning the advertising and commercial use, respectively, of soldiers' names and likenesses without consent of the soldiers or their families. The vendor has since stopped selling T-shirts in those states and has indicated he might do the same in Texas if this bill is enacted.

CSHB 331 would respect the rights of citizens to protest while providing additional protection for the names and likenesses of American soldiers. A person seeking to profit from a soldier's name or likeness simply would first need to get consent from the soldier, a representative of the soldier, or a majority of family members. Protesters still would have many avenues to question the government and the war. However, they would not be able to profit commercially by dragging the names and images of killed or unwitting soldiers into their ventures. Those who sought to celebrate the troops with identifiable images or names would not be prohibited from doing so as long as they first sought the consent of those who would be included in their advertisements.

Because the bill would address only commercial ventures – specifically, advertising – it would avoid many legal and constitutional challenges. The bill also would include exceptions for print and broadcast news outlets. Commercial enterprises generally receive less protection from government restriction than do other forms of speech. It already is possible to seek civil recourse under the Buddy Holly Law (Property Code, ch. 26) when someone has appropriated the name or likeness of an individual for commercial gain after that individual's death. However, that puts the burden on the offended party and would not cover every circumstance

addressed by this bill. CSHB 331 would create an automatic, clear, consistent, and appropriate penalty. A person is not allowed to profit commercially from the use of the name of a celebrity or politician, and the same should be true for commercial gain achieved through exploitation of the name or identifiable image of an American soldier.

Prosecutors and police would continue to have discretion to cite or not cite someone for violating these provisions. The purpose of the bill would be to restrict the exploitative use of identifiable images and names of American soldiers without their consent for commercial gain, and the intent of the Legislature here would be clear.

**OPPONENTS
SAY:**

Despite the worthy intent behind the bill to protect the names of American soldiers and their grieving families, CSHB 331 could raise constitutional questions because of its breadth, vagueness, and potential impact on speech in making this mode of expression a criminal offense. It could affect not only those protesting war but also those celebrating today's troops, as well as past war heroes. It also could be difficult to enforce.

The bill would conflict with the principle of free speech under the First Amendment. Although the bill would target advertising, it also could encompass activity that was not wholly for commercial gain. The more an advertisement using a soldier's name or likeness was akin to a cause than to a business, the more likely the bill would be to run afoul of the Constitution. For example, the Arizona T-shirt vendor has defended his right to use soldiers' names on a T-shirt and in his advertising as an attempt to show the real-life consequences of military action and question the justifications proffered by the government for invading Iraq.

Although two other states have passed laws similar to CSHB 331, the Legislature should not pass a constitutionally questionable law merely because the vendor that prompted these laws has stopped selling T-shirts in those states. It would be difficult to enforce such a law to stop sales of offending merchandise and would achieve that result mainly through the chilling effect it would have on the vendors. Even if an out-of-state vendor advertised and sold products to customers in Texas, the offender still would have to be identified and apprehended, resulting in an expensive and time-consuming undertaking for a misdemeanor offense.

A statute providing for a criminal penalty should aim to be as precise as possible. This bill's breadth could impact not only the kind of activity that

inspired the bill but also those advertising products in support of the troops or celebrating triumphs of military heroes. Some of these soldiers, especially those whose names or likenesses have real commercial value, could seek civil remedies under current law. There is no need to add a criminal penalty that would target speech.

OTHER
OPPONENTS
SAY:

The media exemptions under this bill should be revised to include political commentary and cartoons already protected under the First Amendment and to exempt not only print and broadcast news reports but on-line and other newsgathering and publishing operations as well.

NOTES:

The committee substitute would create an exemption for print and broadcast news media reports and advertisements and added a provision specifying that the individual would have to be clearly identifiable.

The Senate companion bill, SB 277 by Shapiro and Uresti, passed the Senate by 30-0 on March 14 and was reported favorably, as substituted, by the House Defense Affairs and State-Federal Relations Committee on April 19, making it eligible to be considered in lieu of HB 331.