

TAKING ON THE MILITARY FUNERAL PROTEST: A MULTIFARIOUS STATUTE LEANS IN

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I. INTRODUCTION

In 2005, the Westboro Baptist Church (“Westboro”) from Topeka, Kansas, began protesting the funerals of American soldiers killed in action.¹ Typically, the protestors would carry signs with messages like “God Hates Fags” and “Thank God for Dead Soldiers.” In 2011, the Supreme Court of the United States ruled in *Snyder v. Phelps*² that Westboro’s protests were protected under the First Amendment of the United States Constitution.³ Five weeks after *Snyder*, United States Senator Olympia J. Snowe (R-Me.)⁴ introduced a bill, the Sanctity of Eternal Rest for Veterans (“SERV”) Act,⁵ to increase protections for grieving funeral attendees. The bill was signed into law in 2012.

The law amended two existing funeral protest statutes that provided time and distance buffers by expanding the previous zones of protection. The law also substantially strengthened the existing laws by adding a series of provisions imported from Article I of the Constitution and, oddly enough, the Racketeer Influenced and Corrupt Organizations (“RICO”) and Copyright Acts. The effect was to shift costs and risks of litigation from innocent families awash in grief to intentional agitators. Before this law took effect, Westboro actively protested and litigated its right to engage in such protests. Since the new law was signed, Westboro has declined to litigate, and the law has not been challenged even though the United States remained engaged in Afghanistan until 2021.

Although the First Amendment limits how far Congress can go in addressing these protests,⁶ this new law helped to provide a more effective counterbalance. This Article tells the story of how this unique law known as SERV came to be. The antecedent to “how a bill becomes a law” is how an idea becomes a bill. This Article illustrates how a thoughtful legislator can take a difficult

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¹ See *Westboro Baptist Church*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/westboro-baptist-church> [https://perma.cc/87S7-PSHF].

² 562 U.S. 443 (2011).

³ *Id.* at 447.

⁴ Senator Snowe served in the United States Senate from 1995 until 2013; before that, she served in the United States House of Representatives from 1979 until 1995. See Dana Bash & Paul Steinhauser, *Citing Partisanship, Maine’s Snowe Says She’ll Leave the Senate*, CNN (Feb. 28, 2012), <https://www.cnn.com/2012/02/28/politics/senate-snowe-retiring/index.html> [https://perma.cc/C588-Q8VH].

⁵ Filed as S. 815, 112th Cong. (Apr. 13, 2011).

⁶ See U.S. CONST. amend. I.

problem and probe complex ideas to create a bipartisan bill that can become law, survive legal challenges, and meaningfully address a problem.

II. WESTBORO AND THE SUPREME COURT

Fred Phelps founded Westboro in 1955⁷ and a law firm representing Westboro in its civil suits in 1964.⁸ In 1991, Westboro began protesting to promote its beliefs.⁹ Westboro claims to have picketed more than 40,000 times since then.¹⁰ At its protests, Westboro members have held inflammatory signs bearing messages like “God Hates Fags,” “God Hates Jews,” “Thank God for Dead Soldiers,” and “Thank God for AIDS.”¹¹

In 2005, Westboro began targeting the funerals of American soldiers killed in Iraq and Afghanistan and claimed that God was punishing America for tolerating homosexuality and persecuting Westboro.¹² In a 2005 interview, Fred Phelps said, “God is visiting the sins upon America by killing their kids with IEDs . . . and the more the merrier.”¹³

In 2006, Westboro picketed at the Maryland National Veterans Cemetery at the funeral of Lance Corporal Matthew Snyder, who was killed in the line of duty in Iraq.¹⁴ Westboro members held signs with messages such as “Thank God for dead soldiers,” “Fag Troops,” and “You’re going to hell.”¹⁵ After the service, Matthew’s father, Albert Snyder, sued Westboro in the United States District Court for the District of Maryland for defamation, invasion of privacy, and emotional distress.¹⁶ Westboro countered that its signs were protected speech and free exercise of religion under the First Amendment.¹⁷

A jury agreed with Snyder and awarded him \$10.9 million, but the trial judge lowered the award to \$5 million.¹⁸ The United States Court of Appeals for the Fourth Circuit reversed, holding that Westboro members’ speech and religious views were protected “[n]otwithstanding the distasteful and repugnant nature of the words[.]”¹⁹ Worse yet, the Fourth Circuit ordered Albert Snyder to pay \$16,510 for Westboro’s court costs.²⁰ Snyder appealed to the Supreme Court, which held for

⁷ See *Westboro Baptist Church*, *supra* note 1.

⁸ See *id.* In 1979, the Kansas Supreme Court disbarred Phelps, finding that he had disregarded the ethics of the legal profession. See *id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ See *id.*

¹⁴ See Deana Pollard Sacks, *Snyder v. Phelps, the Supreme Court’s Speech-Tort Jurisprudence, and Normative Considerations*, 120 YALE L.J. ONLINE 193 (2010), <http://yalelawjournal.org/forum/snyder-v-phelps-the-supreme-courts-speech-tort-jurisprudence-and-normative-considerations> [<https://perma.cc/CW8E-HWFD>].

¹⁵ See *id.* (citing *Snyder v. Phelps*, 580 F.3d 206, 212 (4th Cir. 2009)).

¹⁶ See *id.* (citing *Snyder*, 580 F.3d at 210–11).

¹⁷ See *Snyder*, 580 F.3d at 214.

¹⁸ See Sacks, *supra* note 14 (citing *Snyder*, 580 F.3d at 211).

¹⁹ *Snyder*, 580 F.3d at 226.

²⁰ See Sacks, *supra* note 14.

Westboro, ruling that the First Amendment immunized Westboro from tort damages under Maryland law.²¹

III. THE SENATOR RESPONDS

As noted in the Introduction, the antecedent to “how a bill becomes a law” is how an idea becomes a bill—that is, how an event becomes identified as a problem, how that problem generates ideas for redress, how those ideas for redress find roots in the reach and limits of existing laws, and how an effective, bipartisan, and constitutionally viable bill can be drafted and passed. The process always starts, as it must, with an earnest and skilled legislator who is willing to put in the work to make it happen.

Senator Snowe, a long-respected protector of veterans’ rights, expressed her deep disappointment with the *Snyder* decision and asked me whether the decision left any room for statutory protections of military funerals. At first blush, there did not appear to be much room. The decision specifically addressed a military funeral protest, and it was grounded in sound constitutional analysis. However, the decision did not discuss, and consequently did not test, the two existing federal statutes governing military funerals and burials.²² By extension, the decision also did not address the limits of Forum Analysis under those statutes.²³ And of course, the case applied only the remedies that were then available to the plaintiffs.

The case also exposed the relatively weak litigation position of grieving families. The families were up against passionate actors, trapped by constitutional limitations, and lacked leverage and procedural advantages. Accordingly, financial recovery was a relatively long shot, worsening the families’ already severely weakened emotional state. All of this was exacerbated when Snyder not only lost his case but was also ordered to pay Phelps’s costs. But if the buffers in existing statutory and constitutional law could be expanded and litigation devices could be developed to help shift litigation risks, the precedential effect of the decision could be limited.

The Senator asked me to brainstorm ideas and develop a draft. As her lead counsel, I had experience in First Amendment law and, more specifically, Forum Analysis. For assistance, I recruited a long-time colleague, Robert S. Frank, Esq.,

²¹ The Court held that Phelps and his followers were speaking on matters of public concern on public property and thus were entitled to protection under the First Amendment. *See Snyder v. Phelps*, 562 U.S. 443 (2011). Even though some of the picket signs arguably targeted only the Snyder family, most of them addressed issues regarding Americans’ moral conduct, the fate of the United States, and homosexuality in the military. *See id.* As such, the “overall thrust and dominant theme” of the speech related to broader public issues. *Id.* at 454. Furthermore, Westboro was picketing on public land adjacent to a public street. *See id.* at 456. Finally, there was no pre-existing relationship between Westboro’s speech and Snyder that might suggest that the speech on public matters was intended to mask an attack on Snyder over a private matter. *See id.* at 455.

²² One statute governs military funerals at cemeteries owned by the United States. 38 U.S.C. § 2413. The other statute applies to any other cemetery where a federal soldier is being buried. 18 U.S.C. § 1388.

²³ Forum Analysis is the doctrine under the First Amendment that permits limitations on the time, place, and manner—as distinguished from the content or message—of speech. *See Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

an excellent private practitioner with deep experience as a federal court litigator and former assistant attorney general prosecuting unfair trade practices.

We met over coffee at 6:30 on a Sunday morning in Maine. In seventy minutes, we identified the type of speech and litigation concepts required. We looked for mechanisms that in the aggregate would have a meaningful practical impact. We discussed importing verbatim standards from other established laws that had already been tested. We identified the places to use both a belt and suspenders for reinforcement, and we sketched how the pieces would work together to provide a substantive holistic approach. Within three weeks of our initial meeting, we completed our research and analysis and felt that we had a substantive approach to offer. The drafting flowed easily because many of the concepts were already developed in other laws.

During that same time, the Senator commented on the developing draft and identified prospective supporters in both the Senate and the House of Representatives. Widely respected for her bipartisan approach, commitment to detail, and previous experience in the House, the Senator knew where and how to find support, and how to marshal that support to action. She quickly attracted thirty-seven bipartisan Senate co-sponsors for her Senate bill and secured submission of an identical House bill with its own thirty-four bipartisan House sponsors.²⁴ The Senator then drew upon her thirty-two years of congressional experience (sixteen years each in the House and Senate) to chart the anticipated procedural paths through the House and Senate committees.²⁵ By April 15, 2011, just five weeks after the Court's decision, our and the Senator's work was done, and she filed the legislation.²⁶

IV. CONGRESS TAKES ACTION

SERV sought to strengthen several existing protections and add several others. In short, the proposed bill would:

²⁴ Nineteen Democrats, seventeen Republicans, and one Independent co-sponsored the Senate bill. *See Cosponsors: S.815—112th Congress (2011–2012)*, CONGRESS.GOV (Nov. 14, 2011), <https://www.congress.gov/bill/112th-congress/senate-bill/815/cosponsors?s=1&r=73> [<https://perma.cc/6WUH-CCR7>]. Representative Charlie Bass (R-N.H.) introduced the House bill with twenty-five Republican and nine Democratic co-sponsors. *See Cosponsors: H.R. 1591—112th Congress (2011–2012)*, CONGRESS.GOV (Jan. 23, 2012), <https://www.congress.gov/bill/112th-congress/house-bill/1591/cosponsors> [<https://perma.cc/NK8A-DE7T>].

²⁵ The Senate bill was referred to the Senate Committee on Veterans' Affairs and the House bill to three House Committees: Judiciary, Veterans' Affairs, and Armed Services. The chair of the Senate Committee on the Judiciary also wanted to review the bill. Senator Snowe answered the chair's questions, and I answered the committee attorneys' questions, and the legislation moved forward.

²⁶ The Senate bill was introduced on April 13, 2011, *see All Actions: S.815—112th Congress (2011–2012)*, CONGRESS.GOV (June 8, 2011), <https://www.congress.gov/bill/112th-congress/senate-bill/815/all-actions?s=1&r=73> [<https://perma.cc/Z77C-8CMH>], and the House bill on April 15, 2011, *see All Actions: H.R. 1591—112th Congress (2011–2012)*, CONGRESS.GOV (Jan. 23, 2012), <https://www.congress.gov/bill/112th-congress/house-bill/1591/all-actions> [<https://perma.cc/4PJJ-NCFK>].

- Expand the class of protected veterans from the Armed Forces to include National Guard veterans employed in the service of the United States.²⁷
- Expand funeral locations from federal²⁸ and non-federal²⁹ cemeteries to include other locations such as churches, funeral homes, or residences of immediate family members where the funerals are held.³⁰
- Expand the distance buffer zones during the service and the time buffer zones before and after the service.³¹
- Limit prohibited conduct to that undertaken with the intent and effect of disrupting, obstructing, or disturbing; and establish a rebuttable presumption of that intent and effect if the violator lacked reasonable grounds to believe, from the attention or publicity the violator sought, that their conduct would not be disruptive.³²
- Establish criminal penalties, civil remedies for actual and statutory damages, and the right of the Attorney General to institute proceedings to seek statutory damages.³³
- Provide that a final judgment or decree rendered in favor of the United States in any criminal proceeding estop a defendant from denying in any subsequent civil proceeding the essential allegations of the criminal offense.³⁴

The Committees only modestly amended Senator Snowe's proposal and folded her proposal, along with several other related measures, into a broader bill on veterans' benefits.³⁵ In the spring of 2012, the House passed that full bill 380–0, and in the summer, the Senate responded with unanimous consent.³⁶ The enacted measure was then presented to President Barack H. Obama, who signed the bill into law on August 6, 2012, and commented:

[One] part of this bill that I want to highlight—prohibit protesting within 300 feet of military funerals during the two hours before and two hours after a service. . . . I am very pleased to be signing this bill into law. The graves of our veterans are hallowed ground. And obviously we all defend our Constitution and the First Amendment and free speech, but we also believe that when men and women die

²⁷ See S. 815, 112th Cong. § 3 (2011) (amending 18 U.S.C. § 1388(f)(1) and adding federally activated National Guard to the definition of Armed Forces otherwise set forth in 10 U.S.C. § 101).

²⁸ These include, for example, Arlington National Cemetery and cemeteries under the control of the National Cemetery Administration, which are governed by 38 U.S.C. § 2413.

²⁹ These are governed by 18 U.S.C. § 1388.

³⁰ See S. 815, 112th Cong. § 3 (2011) (amending 18 U.S.C. § 1388(a)(3)).

³¹ See *id.* (amending 18 U.S.C. § 1388(a)).

³² See *id.* (amending 18 U.S.C. § 1388(e)).

³³ See *id.* (amending 18 U.S.C. §§ 1388(b)–(d)).

³⁴ See *id.* (amending 18 U.S.C. § 1388(c)(4)).

³⁵ The law was enacted as the Honoring America's Veterans and Caring for Camp Lejeune Families Act, Pub. L. No. 112-154, §§ 601–602, 126 Stat. 1165, 1195–1201 (Aug. 6, 2012) (amending 18 U.S.C. § 1388 and 38 U.S.C. § 2413).

³⁶ See *Actions Overview: H.R. 1627—112th Congress (2011-2012)*, CONGRESS.GOV (Aug. 6, 2012), <https://www.congress.gov/bill/112th-congress/house-bill/1627/actions> [<https://perma.cc/JRS2-RKCH>].

in the service of their country and are laid to rest, it should be done with the utmost honor and respect. . . . I think all Americans feel we have a moral, sacred duty towards our men and women in uniform. They protect our freedom, and it's our obligation to do right by them. This bill takes another important step in fulfilling that commitment.³⁷

Three days after the President signed SERV, *Politico* reported that an American Civil Liberties Union (“ACLU”) litigation policy adviser objected that the new measures stifled free speech: “This law is about making the message a federal crime, and that’s a violation of the Constitution to which members of the military swear their oath.”³⁸

The ACLU, however, did not challenge SERV. The only reported case discussing SERV said this: “[I]ts passage by unanimous vote indicates a congressional consensus surrounding the communal importance of funerals and the need to protect mourners at such a particularly vulnerable time in their lives.”³⁹ Likewise, scholarly commentary has been scarce.⁴⁰ And while there is no way to measure with certainty the direct causal impact of the law, it is noteworthy that reports of such protests have withered since SERV took effect, even though the United States remained engaged in Afghanistan until 2021.

V. HOW SERV WAS BUILT

SERV amended two existing funeral protest statutes with two primary goals: (1) to strengthen the position of families who were subject to disruption and disparagement; and (2) to protect the Act itself from First Amendment challenges. To these ends, SERV employed a creative approach. As discussed with details and citations below, the speech-related components drew from the governmental interest embedded in the express military powers of Congress from Article I of the Constitution; the time, place, and manner jurisprudence of the First Amendment; and long-standing principles governing disturbances of the peace. The remedy components were taken from RICO (the cause of action, estoppel, and attorneys’ fees provisions) and Copyright Acts (the damages, rebuttable presumption, and attorneys’ fees provisions).

³⁷ *Remarks by the President at Signing of the Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012*, WHITE HOUSE (Aug. 6, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/08/06/remarks-president-signing-honoring-americas-veterans-and-caring-camp-lej> [<https://perma.cc/U6X2-BFZV>].

³⁸ Kevin Cirilli, *ACLU: New Funeral Law Stifles Speech*, POLITICO (Aug. 8, 2012), <https://www.politico.com/story/2012/08/aclu-new-funeral-law-stifles-speech-079498> [<https://perma.cc/54LK-6WVR>].

³⁹ See *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 690 (8th Cir. 2012) (evaluating city ordinance similar to SERV). Based on a Westlaw search of reported cases citing 18 U.S.C. § 1388 and 18 U.S.C. § 2413 after their amendment.

⁴⁰ See, e.g., Margaret Greco, *Take A Step Back: The Constitutionality Of Stricter Funeral-Picketing Regulations after Snyder v. Phelps*, 23 B.U. PUB. INT. L.J. 151 (2014); Nicholas Primrose, *Has Society Become Tolerant of Further Infringement on First Amendment Rights?*, 19 BARRY L. REV. 313 (2014).

The Compelling Governmental Interest. Anticipating First Amendment challenges, SERV cited Congress' compelling governmental interest for its enactment. Congress stated that SERV was enacted to:

provide necessary and proper support for the recruitment and retention of the Armed Forces and militia employed in the service of the United States by protecting the dignity of the service of the members of such Forces and militia, and by protecting the privacy of their immediate family members and other attendees during funeral services for such members.⁴¹

Congress also named its express powers for enactment:

Congress finds that this section is a necessary and proper exercise of its powers under the Constitution, Article I, Section 8, Paragraphs 1, 12, 13, 14, 16, and 18, to provide for the common defense, raise and support armies, provide and maintain a navy, make rules for the government and regulation of the land and naval forces, and provide for organizing and governing such part of the militia as may be employed in the service of the United States.⁴²

Focus on the Intent and Effect of the Conduct Instead of the Content of the Speech. Generally speaking, protected speech begins to lose its protection when the effect of the speech is to disrupt or obstruct.⁴³ SERV only prohibited conduct undertaken with the intent and effect of disrupting, obstructing, or disturbing, regardless of the content. To that end, SERV proscribed (1) "willfully making or assisting in the making of any noise or diversion" that intends to and does in effect "disturb[] or tend[] to disturb the peace" of the funeral;⁴⁴ (2) "willfully and without proper authorization" intending to and in effect "impeding or tending to impede the access to or egress from" the funeral location;⁴⁵ or (3) "willfully making or assisting

⁴¹ See Honoring America's Veterans and Caring for Camp Lejeune Families Act, Pub. L. No. 112-154, § 601(a)(1), 126 Stat. 1165, 1195 (2012).

⁴² *Id.* at § 602(a)(2). These paragraphs from Article I, § 8 are, in order, the express powers of Congress to "provide for the common defense and general welfare of the United States," "raise and support armies," "provide and maintain a navy," "make rules for the government and regulation of the land and naval forces," "provide for calling forth the militia," "provide for organizing, arming, and disciplining, the militia," and "make all laws which shall be necessary and proper for carrying into execution the foregoing powers." See U.S. CONST. art. I, § 8.

⁴³ "[S]peech that promotes or produces an unlawful end is [generally] not protected by the First Amendment." Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J. COLL. & UNIV. L. 481, 492 (2005). "This class includes expression that promotes the imminent prospect of actual violence or harm, fighting words, terrorist threats, hate speech and speech that constitutes or promotes gross disobedience of legitimate rules." *Id.* at 492-93 & nn.96-100 (footnotes omitted) (citing cases). "This class also includes expression that constitutes criminal or severe harassment, defamation, obscenity, false advertising, criminal trespassing and the use of public resources to promote partisan political activities in violation of state or federal law." *Id.* at 493-94 & nn.101-06 (footnotes omitted) (citing cases).

⁴⁴ 18 U.S.C. § 1388 (a)(3); see also 38 U.S.C. § 2413(a)(2)(A)(ii).

⁴⁵ 18 U.S.C. § 1388 (a)(2); see also 38 U.S.C. § 2413(a)(2)(B)(ii).

in the making of any noise or diversion” that intends to and in effect “disturbs or tends to disturb the peace of” the home of immediate family members.⁴⁶

Time and Distance Buffers. Generally speaking, reasonable time, place, and manner restrictions that are content neutral do not violate the First Amendment.⁴⁷ SERV, therefore, reasonably expanded both the time and distance buffers. As regards the distance, SERV expanded the previous distance buffers from 300 feet to 500 feet from the boundary of the location of the funeral,⁴⁸ and from 150 feet to 300 feet from the intersection between the boundary of the location of the funeral and any access route to that location.⁴⁹ As regards the time, SERV expanded the previous time buffer from 60 minutes to 120 minutes before and after the funeral.⁵⁰ SERV also added time and distance buffers on or near the boundary of the residence of the soldier’s immediate family.⁵¹ This provision was supported by the Supreme Court’s decision in *Frisby v. Schultz*,⁵² wherein the Court upheld a city ordinance banning protests outside residential homes because the government had a legitimate interest in protecting the homes of its residents.⁵³

Civil Remedies. SERV provided two civil causes of action. First, to enable the United States to directly vindicate its compelling governmental interest, SERV conferred upon the United States Attorney General a cause of action for statutory damages.⁵⁴ This option, imported from RICO,⁵⁵ relieved the aggrieved family members of the sole burden of addressing their harm through legal action. Second, to enable an aggrieved person to vindicate their personal interests, SERV provided a civil cause of action for actual damages,⁵⁶ statutory damages between \$25,000 and \$50,000,⁵⁷ and attorneys’ fees.⁵⁸ This right to recover actual or statutory damages was imported from the time-tested Copyright Act.⁵⁹ Actual damages depend on the specifics of a case, and, while the damages can be high, they can also

⁴⁶ 18 U.S.C. § 1388(a)(1)(B).

⁴⁷ See *supra* note 23.

⁴⁸ See 38 U.S.C. § 2413(a)(2)(B)(i).

⁴⁹ See 18 U.S.C. § 1388(a)(1)(A).

⁵⁰ See 38 U.S.C. § 2413(a)(2); 18 U.S.C. § 1388(a).

⁵¹ See 18 U.S.C. § 1388(a)(3).

⁵² 487 U.S. 474 (1988).

⁵³ *Id.* at 488. Schultz opposed abortion and gathered others to picket at the home of a doctor who performed abortions. *Id.* at 476. In response, the City of Brookfield, Wisconsin banned all picketing in front of residential homes for “the protection and preservation of the home.” *Id.* at 477. By a 6–3 vote, the U.S. Supreme Court upheld the ordinance as facially valid under the First Amendment. *Id.* at 488. Although the street constituted a traditional public forum, the City’s ban survived the Court’s scrutiny because the ban was content neutral, left open ample alternative channels of communication, served a significant government interest in protecting the homes of its residents, and did so without favoring one idea over another or wholly eliminating the ability to communicate an idea. See *id.*

⁵⁴ 18 U.S.C. § 1388(c)(2); 38 U.S.C. § 2413(c)(2).

⁵⁵ 18 U.S.C. § 1964.

⁵⁶ 18 U.S.C. §§ 1388(c)–(d); 38 U.S.C. §§ 2413(c)–(d).

⁵⁷ 18 U.S.C. §§ 1388(c)–(d); 38 U.S.C. §§ 2413(c)–(d).

⁵⁸ 18 U.S.C. § 18(c)(3)(B); 38 U.S.C. § 2413(c)(3)(B).

⁵⁹ 17 U.S.C. §§ 504(b)–(c).

be difficult to determine, such as in the case of actual compensable value for one's emotional distress. By contrast, statutory damages can be limited, but they can also ease recovery in cases where actual damages are in fact difficult to determine. Finally, SERV provided an individual with access to attorneys' fees, which is a right imported from both RICO⁶⁰ and the Copyright Act.⁶¹

Criminal Penalties. To further reflect the seriousness of the proscribed conduct, SERV also prescribed criminal penalties. Violators could be fined, imprisoned for no more than one year, or both.⁶²

Evidentiary Rule: A Rebuttable Presumption. To draw a clearer focus on the intent and effect of the agitator's conduct, SERV provided a rebuttable presumption that a violation is willful if the violator lacked "reasonable grounds to believe, either from the attention or publicity sought by the violator or other circumstance, that the conduct of the violator would not" disrupt the service, impede access to or exit from the service, or disturb any immediate family member at their home on the day of the service.⁶³ This concept of a rebuttable presumption drew, again, from the Copyright Act.⁶⁴

Collateral Estoppel. Finally, to foreclose any unnecessarily protracted litigation, SERV provided that a "final judgment or decree rendered in favor of the United States in any criminal proceeding . . . under this section" would estop a defendant from "denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by a person or by the United States."⁶⁵ This concept was also imported from RICO.⁶⁶

VI. CONCLUSION

This Article has told the story of how a series of sophisticated ideas became a bill, and how that bill became a law. The First Amendment limited how far Congress could go in addressing these protests, but Senator Snowe provided a counterbalance by expanding zones of protection and significantly shifting costs and risks of litigation from innocent grieving families to intentional professional agitators. While respecting the Constitution, the statute has become a lasting effort to honor Lance Corporal Matthew Snyder and all other veterans who gave to our country their last full measure of devotion.

⁶⁰ 18 U.S.C. § 1964(c).

⁶¹ 17 U.S.C. § 505.

⁶² 18 U.S.C. § 1388(b); 38 U.S.C. § 2413(b).

⁶³ 18 U.S.C. § 1388(e); 38 U.S.C. § 2413(e).

⁶⁴ 17 U.S.C. § 504(c)(3)(A).

⁶⁵ 18 U.S.C. § 1388(c)(4); 38 U.S.C. § 2413(c)(4).

⁶⁶ 18 U.S.C. § 1964(d).