THE STOLEN VALOR ACT: WHY IT SHOULD BE REVISED TO BETTER PROTECT THE HONOR OF OUR ARMED FORCES

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INTRODUCTION

On November 9, 2009, the line between a liar and a criminal was put to the test.¹ Xavier Alvarez (Alvarez), a man fond of tall tales, told a story that led to his arrest. If you listened to Alvarez he would tell you heroic tales from when he was a helicopter pilot in Vietnam, or a police officer, or even about his stint as a hockey player for the Detroit Red Wings.² He might even tell you about his former wife, a famous Mexican actress to whom he was secretly married.³ While none of these stories were true, Alvarez could not face criminal liability for telling them.⁴ On the other hand, when Alvarez lied about receiving a Congressional Medal of Honor, he was indicted on two counts of violating the Stolen Valor Act (the Act).⁵

In 2007, Alvarez won a seat on the Three Valley Water District Board of Directors in Southern California.⁶ In July of that year at a water board meeting, Alvarez made the statement: “I’m a retired Marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy.”⁷ Alvarez has never been in the United States Armed Forces nor has he won the Congressional Medal of Honor.⁸

After the FBI acquired a recording of Alvarez’s false statements,⁹ he was indicted in the Central District Court of

1. United States v. Alvarez, 617 F.3d 1198, 1200 (9th Cir. 2010).
2. Id.
3. Id.
4. Id.
6. Alvarez, 617 F.3d at 1201.
7. Id. at 1200.
8. Id. at 1201.
9. The summer before Alvarez was elected to the water board, a woman reported
California for “falsely represent[ing] verbally that he had been awarded the Congressional Medal of Honor when, in truth and as [he] knew, he had not received the Congressional Medal of Honor” in violation of the Stolen Valor Act. 10 He was the first person charged and convicted under the current version 11 of the Act.12 The Ninth Circuit Court of Appeals overturned his conviction on First Amendment grounds.13

The Act provides in pertinent part:

(b) False claims about receipt of military decorations or medals:

Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.14

Accordingly, the Act criminalizes false verbal or written representations regarding receipt of military awards.15 It does not require that someone is harmed by these false representations or that another person relied on them, but only that such representations were made.16 While the Act serves desired ends,
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protecting the honor and morale of American troops, the means violate the First Amendment because the Act was not written in conformity with constitutional requirements. Therefore, Congress should revise the Act so that it can serve its desired purpose in agreement with the First Amendment.

On appeal of the Alvarez case, the Ninth Circuit found the Act unconstitutional. However, out of respect to the legislative process, the court refused to rewrite the statute or enumerate how the legislature should do so. This article will attempt to do exactly that. Through an analysis of Alvarez and other relevant cases, this article will explain why the statute is unconstitutional and will make the necessary revisions for the Act to conform to First Amendment standards.

Part I of this article will describe the legislative history and intent behind the Act. Part II will show that the Act is constitutionally invalid as a content-based restriction on speech. This section will also explain why the Act is subject to strict scrutiny review and will demonstrate where the Act falls short under the strict scrutiny test. Part III will argue that false factual speech is worthy of First Amendment protection. Part IV will explain how the Roberts Court has consistently protected free speech. Finally, Part V will offer a revision of the Act.

PART I. THE LEGISLATIVE INTENT BEHIND THE ACT

Vietnam Veteran, Representative John T. Salazar (R. Colorado), introduced the Act as a bill in 2005 and Congress enacted it in 2006. Salazar wrote the bill at the urging of a Colorado State University Student, Pam Sterner. Sterner, who was a staffer for Salazar, wrote a paper for school that argued for broader laws concerning false claims of military honors. At the time only the false wearing of a war medal was prohibited.

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17. Alvarez, 617 F.3d at 1199.
18. See id. at 1217.
20. Id.
21. Id.
22. Anne C. Mulkern, Rep. Salazar’s Bill on Falsely Claiming Medals Now a Law,
student’s paper persuaded Salazar to draft the bill.23

Before the Act became law, Salazar acted as a whistle blower on those who falsely claimed to have received military awards and decorations.24 The politician even affected advertising for the Hollywood blockbuster, “Wedding Crashers.”25 In the film, the protagonists played by Vince Vaughn and Owen Wilson discussed using fake Purple Heart medals to pick up women.26 The website for the movie included fake cut-out Purple Hearts that fans of the movie could print out and use in their own wedding crashing endeavors.27 Salazar was outraged and urged the production company to end the advertising campaign.28 After the company removed the material from its website Salazar stated:

If any movie-goers take the advice of the ‘Wedding Crashers’ and try to use fake Purple Hearts to get girls, they may wind up picking up an FBI agent instead I am pleased that New Line Cinema has agreed to take down offensive parts of the Web site. Our veterans and FBI agents are working hard to make sure that we honor our true heroes, no one should undermine their efforts.”29

An examination of the legislative history behind the Act shows that in its current form, it covers a broader range of speech than the legislature likely intended.30 The legislative history behind the Act demonstrates that Congress intended for the Act to prevent fraud by those who falsely claim to have received military awards.31 However, the Act in its current form covers all lies regarding receipt of military honors, including statements that the listener did not believe, rely upon, or that did not cause

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23. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id.
31. Id.
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any harm to the listener.32

When drafting the Act Congress found that: “Fraudulent claims surrounding the receipt of... decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals.”33 The use of the term “fraud,” while referring to the crime that the Act was intended to prevent, was not accidental or limited to this single statement.

Further proof of the legislative intent behind the act is found in the words of Senator Kent Conrad, one of the bill’s sponsors. Referring to people who falsely claim receipt of military awards, Senator Conrad said, “Imposters use fake medals-or claim to have medals that they have not earned-to gain credibility in their communities. These fraudulent acts can often lead to the perpetration of very serious crimes.”34 Additionally, after the Act was signed into law, Salazar proudly stated, “This day has been a long time in coming. The brave men and women who have earned awards for service to our country should not have those honors tarnished by frauds.”35 The repeated use of the word “fraud” both in the congressional findings36 used by the legislature while drafting the Act and in remarks made by the Act’s sponsors offer proof that the Act was intended to prevent fraud. Though the intent of Congress may have been to prevent fraud, the Act is written to have a far wider scope. In order to conform to constitutional standards, the Act must be revised so that the language of the statute corresponds with ends that the statute seeks to achieve.

32. United States v. Alvarez, 617 F.3d 1198, 1201 (9th Cir. 2010).
33. 8 U.S.C. § 704 (b).
35. Mulkern, supra note 22.
36. Before creating the Act Congress made the following findings:
(1) Fraudulent claims surrounding the receipt of the Medal of Honor, the distinguished-service cross, the Navy cross, the Air Force cross, the Purple Heart, and other decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals. (2) Federal law enforcement officers have limited ability to prosecute fraudulent claims of receipt of military decorations and medals. (3) Legislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals.
Stolen Valor Act § 706.
PART II. THE ACT IS AN UNCONSTITUTIONAL RESTRICTION ON SPEECH

The First Amendment stipulates that “Congress shall make no law . . . abridging the freedom of speech.” Constitutional jurisprudence has generally provided that “as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” Generally, there are two types of restrictions on free speech. The first type of restriction is “content neutral,” although the restriction has nothing to do with the actual content of the expression, it has the unintended effect of limiting speech.

The second type of restriction is a “content-based” restriction on free speech. Content-based restrictions are “restrictions on the voicing of particular ideas.” For example, if a city only permitted certain groups to hold parades, and denied others this right, this restriction would be content-based. The city would be limiting certain groups’ rights to expression based upon the content of that expression. Essentially, content-based restrictions on speech are those that quell, hinder, or put higher burdens on speech solely based on its content.

The Act is a content-based restriction on speech because it criminalizes making a particular statement. The offending statement in this case is that one has received a military medal when he or she in fact did not. This purpose implicitly involves regulating the content of one’s speech; “the Act targets words about a specific subject: military honors.” In Strandlof, the defendant Rick Strandlof was charged under the Act for falsely representing that he was awarded a Silver Star and a
another case involving the Act, the district court held that the Act was clearly a content-based restriction on speech:

[T]here is little doubt that the Stolen Valor Act is content-based. By definition, the speech regulated is speech about a particular topic—the speaker’s claim to have been awarded a particular military medal or decoration. The effect on such speech is not incidental; the entire purpose of the Act is to suppress those precise utterances. The Act, in other words, is justified by a desire to curb speech about a specific topic. I therefore have little trouble in concluding that the Stolen Valor Act constitutes a content-based restriction on speech.49

Restrictions on the content of an individual’s speech are prohibited under First Amendment doctrine.50 The Supreme Court has held, “The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.”51 The government, even in good faith, should not substitute its judgment for that of the people when deciding what should or what should not be said because “free and robust debate cannot thrive if directed by the government.”52 Content-based restrictions on speech are usually prohibited under the First Amendment.

Certain well known content-based restrictions on speech are exempt from First Amendment protection; however, these exemptions can be distinguished from the type of speech criminalized under the Act.53 Government regulation of obscenity,
fraud, defamation, incitement and speech integral to criminal conduct are all examples of content-based restrictions on speech which are permissible by law without running afoul of the First Amendment. These are examples of “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” The Supreme Court is extremely resistant to adding new categories to these historical exclusions.

In United States v. Stevens, the government argued that the Court should add “depictions of animal cruelty” to this list of historical exclusions. The government contended that the following balancing test could be used to determine whether a category of speech should be added to the exclusions: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.” The Court not only rejected this argument, but also found the government’s suggestion “startling and dangerous.” The Court held that a test that weighs the risks and benefits of a certain type of speech cannot be used by the government to imprison a speaker “so long as his speech is deemed valueless or unnecessary.” First Amendment doctrine prohibits the government from deciding the value of speech. While certain categories of speech have been held beyond the scope of First Amendment review, the Court does not lightly extend the scope of these exceptions.

Similarly, “false claims about receipt of military awards” should not be added to the category of historic exclusions from First Amendment protection. If the government were allowed to criminally charge those who lied about receiving military awards, this would permit the government to increasingly interfere with citizens’ freedom of expression. The court in Alvarez argued that were this allowed:

56. Stevens, 130 S. Ct. at 1585.
57. Id.
58. Id.
59. Id.
60. Id. at 1586.
61. Id.
62. United States v. Alvarez, 617 F.3d 1198, 1200 (9th Cir. 2010).
[T]here would be no constitutional bar to criminalizing lying about one’s height, weight, age, or financial status on Match.com or Facebook, or falsely representing to one’s mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving on the freeway. The sad fact is, most people lie about some aspects of their lives from time to time. Perhaps, in context, many of these lies are within the government’s legitimate reach. But the government cannot decide that some lies may not be told without a reviewing court’s undertaking a thoughtful analysis of the constitutional concerns raised by such government interference with speech. We have no doubt that society would be better off if Alvarez would stop spreading worthless, ridiculous, and offensive untruths. But, given our historical skepticism of permitting the government to police the line between truth and falsity, and between valuable speech and drivel, we presumptively protect all speech, including false statements, in order that clearly protected speech may flower in the shelter of the First Amendment.63

There is little argument that a person falsely claiming receipt of military awards is annoying, offensive and pathetic. However, the restriction on speech at issue, regardless of the nature of the speech targeted, must face the same constitutional scrutiny as all other similar restrictions on free expression.

As a content-based restriction on speech, the Act is subject to an intensified standard of review.64 This heightened standard of review65 is known as strict scrutiny review and "strict scrutiny leaves few survivors."66 As the “baseline rule” on content-based

63. Id. at 1202.
64. Id. at 1200.
65. The idea of a heightened standard of review originates from footnote four of United States v. Carolene Products: “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.” United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938) (citations omitted).
regulations on speech, strict scrutiny review is one of the most important formulas for the interpretation of constitutional values.\textsuperscript{67} The Warren Court developed this review standard in the 1960’s as a judicial test to assess fundamental rights.\textsuperscript{68} This analysis tool allows for tightly drafted statutes that protect important government interests to survive while statutes that encroach on individual liberties fail.\textsuperscript{69} To survive this test a restriction must: a) serve a compelling governmental interest; b) be the least restrictive means of advancing that interest; and c) be narrowly tailored to achieve that interest.\textsuperscript{70}

\textbf{A. COMPELLING GOVERNMENT INTEREST}

The Supreme Court has described a compelling state interest as an interest of “the highest order.”\textsuperscript{71} Maintaining the federal tax system\textsuperscript{72} and protecting the welfare of children have both been deemed compelling government interests by the Court.\textsuperscript{73} The Act clearly meets this element of the strict scrutiny test. There is a compelling government interest in honoring and motivating the troops. “Especially at a time in which our nation is engaged in the longest war in its history, Congress certainly has an interest, even a compelling interest, in preserving the integrity of its system of honoring our military men and women for their service and, at times, their sacrifice.”\textsuperscript{74} The Act was written with this compelling interest in mind; however, the text of the Act does not effectuate this interest in a constitutionally permissible manner. While the Act easily meets the first prong of the strict scrutiny test, it does not pass constitutional muster under the next two prongs.

\textbf{B. NARROWLY TAILORED TO ACHIEVE A COMPELLING INTEREST}

The second prong of the strict scrutiny test requires that the Act is narrowly tailored to achieve the legitimate government

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\textsuperscript{68} Id. at 1270.
\textsuperscript{69} Id.
\textsuperscript{70} United States v. Stevens, 130 S. Ct. 1577, 1584 (2010).
\textsuperscript{73} Prince v. Massachusetts, 321 U.S. 158, 166-67(1944).
\textsuperscript{74} United States v. Alvarez, 617 F.3d 1198, 1216 (9th Cir. 2010).
\end{footnotesize}
interest of honoring the troops. To determine whether a statute is narrowly tailored, courts look at whether the statute focuses on and solves the precise problem at which the statute was directed. This exact issue is the government’s reason for drafting the statute in the first place. If the government has a compelling interest, as it did in creating the Act, that interest must be enforced by means that are narrowly tailored to the government interest. In other words, a statute that affects the freedom of speech cannot be “overly broad.” In most circumstances the state has the burden of proving that the statute is narrowly tailored and is not overly broad. The government will not be able to meet this burden as applied to the Act.

To prove that the Act is narrowly tailored, the government has the burden to demonstrate that “criminal sanctions for those who lie about receipt of military awards” are “the best and only way to ensure the integrity of such medals.” This is not the case: “it seems just as likely that the reputation and meaning of such medals is wholly unaffected by those who lie about having received them. The greatest damage done seems to be to the reputations of the liars themselves.” People who lie about receiving military awards damage their own reputations, not the reputations of those who have truly earned such awards.

Since Alvarez went to trial, both the press and the public have repeatedly ridiculed him. Specifically, the Los Angeles Times succinctly stated “[n]ot for the first time, an unsavory individual has been the beneficiary of a generous interpretation of the First Amendment. But nothing in this thoughtful decision protects Alvarez or other pretenders to valor from the shame that no court can erase.” This is especially true for Alvarez himself, who is no longer on the Three Valley Water Board and has become a nationwide “laughing stock.” The American people will continue

75. Ent. Software Ass’n v. Blagojevich, 469 F.3d 641, 646 (7th Cir. 2006).
76. Id.
77. Id.
78. Id. at 649.
79. Id.
80. United States v. Alvarez, 617 F.3d 1198, 1216 (9th Cir. 2010).
81. Id.
to honor and respect our brave soldiers despite false claims by others. In fact, the lies of others may even increase our respect for those who have truly earned military awards. The reputation and respect accorded to military awards is not so fragile that a false claim about receiving such an honor will discredit the true heroes of our armed forces.

The Act is not narrowly tailored to achieve the legitimate government interest of honoring the troops because it is not written to sufficiently focus on the wrong that it is designed to prevent. A more tightly written statute is necessary for the Act to satisfy the narrowly tailored prong of the strict scrutiny test.

C. LEAST RESTRICTIVE MEANS OF ACHIEVING THE COMPELLING GOVERNMENT INTEREST

The third and final prong of the strict scrutiny test requires that a statute is the least restrictive means of achieving the government’s compelling interest. Even when a statute has a legitimate purpose, “that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” A government purpose is not achieved by the least restrictive means if there are other ways to achieve that statute’s end by using means that have a lesser burden on constitutionally guaranteed rights.

Much of the debate over the validity of the Act is focused on whether the Act is the least restrictive means of furthering the government interest. In United States v. Robbins, one of the few

85. Id.
86. Id.
87. In United States v. Robbins, Ronnie L. Robbins was indicted under the Act in November 2010 in the United States District Court for the Western District of Virginia for falsely claiming he had been awarded the Vietnam Service Medal and the Vietnam Campaign Medal. Although Robbins served in the Army on active duty from 1972 to 1975, he did not serve overseas or in a combat capacity nor was he awarded or entitled to any medals or awards. After he was indicted, Robbins moved to quash the charges on First Amendment grounds. The court denied his motion. On March 1, 2011, the jury returned a guilty verdict against him for violation of the Act. United States v. Robbins, 759 F.Supp. 2d 815 (W.D. Va. 2011); see also, Press Release, U.S. Dept of Justice, Former Dickenson County Commissioner of Revenue Sentenced on Defrauding Department of Veterans Affairs and Lying about Military Service (July 12, 2011), http://www.justice.gov/usao/vaw/news/2011/robbins_12jul2011.html.
decisions upholding the validity of the Act, the court held that the Act accomplished the government interest by the least restrictive means possible:

Preventing individuals from wearing honors they did not earn furthers a substantial government interest in honoring specified members of the military and preserving the respect and novelty of legitimate military decorations. The statute’s purpose is not related to the suppression of free speech, and incidental restrictions on freedom are no greater than is essential for the furtherance of that purpose. 88

This decision is erroneous. What the court failed to take into account is that a restriction on free speech is not constitutional where a less restrictive alternative is available. 89 In Alvarez, the court enumerated several other methods by which the integrity of military medals could be protected. These methods included the dissemination of the names of both legitimate and false claimants of military awards, the prohibition of portrayal as a veteran to gain certain benefits, and the description with greater care of what is required to violate the Act. 90

There are not only other ways to honor the armed forces but there are also better ways. Doug Sterner, 91 a veteran and military historian, has taken matters into his own hands by compiling a massive database of military award recipients. 92 Sterner has helped hundreds of veterans find service records and documentation of military honors that the Department of Defense has lost. 93 Sterner’s work has helped countless veterans show their eligibility for Veteran’s Administration benefits and receive due recognition for their sacrifice, including the right to burial in national cemeteries with full military honors. 94

88. Robbins, 759 F. Supp 2d. at 822.
89. United States v. Alvarez, 617 F.3d 1198, 1216 (9th Cir. 2010).
90. Id. at 1210.
91. Sterner’s wife, Pam was the student whose paper encouraged Rep. Salazar to draft the Act, see supra note 22; see Karen Westerberg Reyes, Defending True Soliders, AARP (Nov. 2011), http://www.aarp.org/politics-society/advocacy/info-10-2011/defending-true-soliders.html
93. Id.
94. Id.
Any problem created by false claims of military honors can be remedied by more speech. By exposing those who falsely claim to have received military awards, the harm done by these lies can be undone. There are many ways for the government to expose those who falsely claim to have received a military award. For example, the Department of Defense could create a user-friendly database that includes all the names of those who have received military awards. By creating such a database, the courage of our armed forces can be commemorated. Also, people who falsely claim to have received military awards would be instantly discredited by the absence of their name on the database. After the creation of a military award database, more words could correct the lies of people like Alvarez and criminal sanctions would be unnecessary.

The modern world is an age of fast and often free information. Information, not criminal sanctions, is the best way to honor the sacrifice and valor of our armed forces. Less intrusive means are available to honor our troops; therefore the Act does not achieve its goal by the least restrictive means available.

The Act satisfies only one of the three prongs of strict scrutiny review. There is a compelling government interest in honoring and motivating our troops. However, the statute is not narrowly tailored to achieve that interest because it does not focus on and eliminate the exact problem that it seeks to solve. Further, the Act does not survive the third prong of the strict scrutiny test because it does not achieve its purpose by the least restrictive means available, as there are other and less speech prohibitive methods of preventing false claims of receipt of military awards. The Act does not meet two of the three requirements under the strict scrutiny test and therefore is unconstitutional.

PART III. FALSE FACTUAL SPEECH IS WORTHY OF FIRST AMENDMENT PROTECTION

Many proponents of the Act argue that it is constitutional because it only criminalizes statements that are untrue and

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therefore worthless.96 Under this argument, the First Amendment does not protect the speech criminalized by the Act, because the Act only criminalizes statements that are not true. However, the adoption of this rule would turn “customary First Amendment analysis on its head.”97 In order to maintain a strong and free marketplace of ideas, the First Amendment must protect speech regardless of its value to society, not just speech that a court deems worthy of protection.

The Robbins court held that the Act did not violate the First Amendment.98 Further, the court held that the Act is constitutional because lies about the receipt of military awards are false statements of fact and cannot be considered “speech that matters.”99 The decision contained three reasons why speech should be protected. First, “some lies are protected to prevent a chilling effect that would stifle protected statements.”100 This argument suggests that people would self-censure, or filter out what they said before they said it, if criminal or civil liability would result from their words.101 This would be detrimental in a free society because people might not say things that were true and important, for fear of repercussions.102 The court’s second reason why false speech should be protected is essentially for the free exchange or marketplace of ideas: “some ideas will be wrong, but the wrong ideas will instill in the public greater confidence that what is accepted as the truth is really the truth.”103 Addressing the third point, the court held that “enforcement [of speech] as unlawful by the government may create a conflict between the motivations of the government and the imperatives of free speech under some circumstances.”104 This argument implies that free speech should be protected because otherwise the government might criminalize speech to support its own agenda.

While under the circumstances above the First Amendment protects false-factual speech, the Robbins court held that the

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96. United States v. Alvarez, 617 F.3d 1198, 1203 (9th Cir. 2010).
97. Id. at 1204.
99. Id.
100. Id. at 820.
101. Id.
102. Id.
104. Id.
speech criminalized under the Act is not worthy of such protection. The court’s main justification for this proposition is that the statements criminalized by the Act are made about oneself and can be easily verified. Therefore, the court argues, there is no possibility of suppressing opinions or statements that are true. However, this is a core reason why the Act is invalid. More speech, not criminal sanctions, can expose those who lie about the receipt of military awards. Therefore, criminal sanctions are not necessary and in fact overreach constitutional boundaries.

The Robbins court also found that: “The speakers targeted by the law do not advocate any particular political or cultural viewpoint or question prevailing dogma or beliefs about any historical or scientific issue. Thus, the justification that some false speech strengthens and clarifies the truth is inapplicable.” This finding leaves a gaping hole in First Amendment interpretation as it implies that the government should determine whether a fact is political, cultural or historic. Unnecessary government regulation of speech has the potential to lead to self-censorship beyond the level that society is prepared to accept as reasonable. Further, the Supreme Court has expressed concern about giving the government the power to regulate speech based on its truth or falsity as “authoritative interpretations of the First Amendment have consistently refused to recognize an exception for any test of truth - whether administered by judges, juries, or administrative officials.” The First Amendment was created in order to allow the people to decide whether information is valuable to them. The government should not be entrusted with such an important power because of the enormous potential for abuse.

Allowing the government to decide which speech has value and which does not “would steadily undermine the foundation of the First Amendment” by allowing the government to interfere greatly with peoples’ conversations. The Alvarez court

105. Id.
106. Id.
108. Id. at 820.
112. United States v. Alvarez, 617 F.3d 1198, 1204 (9th Cir. 2010).
expounded upon this argument:

How, based on the principle proposed by the government, would one distinguish the relative value of lies about one’s receipt of a military decoration from the relative value of any other false statement of fact? The government argues that the ‘protection of false claims of receipt of military honors is not necessary to a free press, to free political expression, or otherwise to promote the marketplace of ideas.’ But in nearly every case, an isolated demonstrably false statement will not be considered “necessary” to promoting core First Amendment values, and will often be contrary to it. In nearly every case, the false statement will be outweighed by the perceived harm the lie inflicts on the truth-seeking function of the marketplace of ideas. Using such an approach, the government would almost always succeed. However, such an approach is inconsistent with the maintenance of a robust and uninhibited marketplace of ideas.\footnote{113}

The type of speech criminalized by the Act is not undeserving of protection simply because it is knowingly false. Knowingly false statements of fact should face the same constitutional protection as all other statements. Even though the speech criminalized by the Act is obnoxious, in a free society its protection is still necessary. “We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.”\footnote{114} The speech criminalized by the Act is not exempted from First Amendment protection simply because it is unpopular, untrue or annoying.

\textbf{PART IV. THE ROBERTS COURT IS RESISTANT TO RESTRAINTS ON FREE SPEECH}

The Supreme Court under Chief Justice John G. Roberts Jr. has consistently protected free speech, even when the content of that speech is repugnant and unpopular.\footnote{115} On February 22,
2012, Xavier Alvarez got his chance to bring his case before the Court. During a one-hour oral argument, Alvarez himself conceded that his false statements were reprehensible. However, he also maintained the argument that his statements should not be illegal. Although the decision may be unpopular, the Court will likely agree with Mr. Alvarez and continue its trend favoring the protection of free speech.

In United States v. Stevens, the Supreme Court struck down a law that criminalizes the “portrayal of harmful acts” against animals. Stevens, the defendant, was charged with selling videos portraying dogfights. The Court held that the animal cruelty law that Stevens was convicted under was invalid because it had the potential to criminalize conduct that is permissible, for example filming or selling a hunting video. Videos depicting animal cruelty are undoubtedly unpopular and reprehensible; however, the Court struck down the law against them because the law itself was not written in conformity with the Constitution.

The Roberts Court handed down another controversial decision in Citizens United v. Federal Election Commission. In Citizens United, the Court held that the First Amendment protects political spending as a form of free speech. Additionally, the Court held that corporations and unions are permitted to spend money to support and denounce political candidates. Moreover, the Court stated that since political speech “is central to the First Amendment’s meaning and purpose,” the First Amendment forbids the creation of such restrictions. Writing for the majority, Justice Kennedy said: “If
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the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.” 127 Once again, the Court made an unpopular decision, but a decision that extended First Amendment protections.

The controversial line of decisions continued with Synder v. Phelps. 128 In Synder, the Court held that the First Amendment protected the rights of the Westboro Baptist Church to picket military funerals. 129 The church espouses the view that God is punishing America for its tolerance of homosexual people and protests soldiers’ funerals with offensive signs. 130 These signs include statements such as “Thank God For Dead Soldiers,” “Fags Doom Nations” and “Priests Rape Boys.” 131 The suit was brought by the father of Marine Lance Corporal Matthew Snyder who was killed in the line of duty in Iraq. 132 After the Westboro Baptist Church protested at Snyder’s funeral, his father sued the church for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. 133 In the majority opinion, Chief Justice Roberts confirmed the Court’s position on the protection of free speech:

Speech is powerful. It can stir people to action, move people to tears of both joy and sorrow, and-as it did here-inflict great pain. On the facts before us we cannot react to that pain by punishing the speaker. As a nation we have chosen a different course-to protect even hurtful speech on public issues to ensure that we do not stifle public debate. 134

While the views of the Westboro Baptist Church may be unpopular, the Court upheld the rights of the church to express those views. 135 There is little argument that the statements made by the Westboro Baptist Church contributed to public
discourse. However, because these statements were made on public property, in a peaceful manner, and in full compliance with local regulations, the statements are protected by the First Amendment.

Lying about receiving a medal that others have fought and died for is iniquitous. However, the First Amendment was not created to protect speech that is popular. Instead, the First Amendment protects speech without regard to the popularity of its content or value of its message to society. The Court, when it reaches its decision, will likely find the Act unconstitutional. In order for the Act to protect the honor of our armed forces without impeding free speech, the Act should be revised.

PART V. THE ACT SHOULD BE REVISED TO MIRROR A FRAUD LAW

The likelihood that the Supreme Court will find the Act unconstitutional necessitates a revision of the Act. In United States v. Stevens, another First Amendment Case, the Court struck down a statute that was intended to prevent the creation and distribution of crush videos. Crush videos show animals being tortured and killed and are made for persons with a particular sexual fetish. While the goal of the statute was valid and compelling, the statute was written in an overbroad manner. Therefore, the Court held the statute unconstitutional.

However, the day after the statute was overruled by the Court, the Congressman who wrote the original statute introduced a bill that amended the statute to conform to constitutional standards. The new bill specified that the statute was only intended to apply to crush films. Like the statute in Stevens, the goal of the Stolen Valor Act is valid and just, nonetheless the legislation was not written in compliance with constitutional requirements. For that reason, the Act should

136. Id.
137. Id.
139. Id.
140. Id. at 1592.
142. Id.
be revised to mirror a fraud law in conformity with the legislative intent behind the Act and under the standards of permissible restrictions on speech under the First Amendment.

The clear intent of Congress in creating the Act was to prevent fraud relating to military awards. Yet, a comparison between the Act and fraud law quickly reveals the Act’s flaws. For a cause of action under a charge of fraud, the following elements are required: "false representation of a present or past fact made by defendant, action in reliance thereupon by plaintiff, and damage resulting to plaintiff from such misrepresentation." The Act lacks the reliance and injury elements necessary for a charge of fraud. Under the Act a person can be charged simply for making a false statement. The clear disparities between the Act and a fraud statute keep it from surviving strict scrutiny review.

By revising the Act so that it is more akin to a fraud statute, the Act can be written to survive the strict scrutiny test. "As presently drafted, the Act is facially invalid under the First Amendment, and was unconstitutionally applied to make a criminal out of a man who was proven to be nothing more than a liar." By revising the Act to conform with constitutional standards, the Act can punish criminals and not just liars. The following revisions should be made to the Act:

(b) False claims about receipt of military decorations or medals.—Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item with knowledge of its falsity and for the purpose of inducing another person to act, and upon which the other person relies with resulting injury or damage, shall be fined under this title, imprisoned not more than six months, or both.

143. United States v. Alvarez, 617 F.3d 1198, 1212 (9th Cir. 2010).
144. Id.
146. Alvarez, 617 F.3d at 1212.
147. Id.
148. Id. at 1216.
These seemingly small changes make a significant difference in application. Once these changes are effectuated, the Act will survive the three prongs of the strict scrutiny test. There is a compelling government interest for which the Act was created to protect. The proposed revision of the Act is narrowly tailored to that interest because it refers to a specific type of false statement that must be made with a particular intent and which a person relies upon causing her injury. Additionally, as proposed, the Act does not apply to jokes told in a bar, lies fabricated in a pick-up attempt, or any other action that does not harm another human being. Finally, the proposed revision is the least restrictive means of accomplishing the compelling government interest. By requiring actual harm, something more than mere words are required for criminal liability. Thus, there is a sufficiently close connection between the harm to be prevented and the speech that causes that harm. As such, the proposed revision of the Act can survive constitutional scrutiny while achieving its compelling interest of honoring our armed forces.

A revised Act will be constitutionally valid; consequently, those who violate the law will not be able to claim First Amendment protection. However, under the new law Alvarez would likely remain unpunished. Alvarez was indicted for claims made after his election to the water board as opposed to during his election campaign. Therefore, a court would likely find that his statements did not induce anybody to act in reliance on those claims with resulting injury or damages. Even under a revised Act, Alvarez would most likely escape criminal prosecution. Still, the public humiliation suffered by Alvarez is likely sufficient deterrence to those who desire to make false claims about receipt of military awards.

If revised as proposed, the Act would target people like William G. Hillar. Hillar claimed to be a retired Colonel in U.S Army Special Forces who served in Asia, the Middle East and Central and South America. In fact, Hillar never served in the Army. Based on his impressive and false credentials, Hillar

149. Alvarez, 617 F.3d at 1200.
151. Id.
152. Id.
The Stolen Valor Act

was able to make $32,500 in five years as a freelance lecturer for the Monterey Institute of International Studies.\textsuperscript{153} Hillar also gave lectures to an impressive list of universities and government agencies including the FBI, the Army and local and state police agencies across the country.\textsuperscript{154} Assuming Hillar falsely claimed receipt of a military award (there is no evidence that Hillar made such a claim), he could be prosecuted under the revised Act. Law enforcement officers would easily be able to show reliance upon a false claim of receipt of military awards by showing Hillar was hired after making such statements. Furthermore, the entities that hired him suffered injury and damages; both in the amount of money they paid him based upon his false credentials and in damage to the reputation of the organizations. A revised Act protects the honor of those who have received military awards and punishes those who lie about receipt of military awards in order to defraud others. Men and women who lie about honors that they have not received and cause harm to others will face criminal sanctions under the revised Act and will not be able to use the First Amendment as a defense.

CONCLUSION

The legislative history behind the Act demonstrates that it was intended to prevent fraudulent acts by those who falsely claim to have received military awards. However, because the Act was not written in accordance with constitutional requirements, the Act is an invalid restriction on free speech. The Act targets speech about a particular subject: false claims of receipt of military awards. As such, the Act is a content-based restriction on speech. While the Act serves a compelling government interest, honoring our troops, it is not narrowly tailored to achieve that interest, nor does it serve that interest by the least restrictive means available. Thus, the Act will likely not survive strict scrutiny review by the Supreme Court. The Roberts Court has consistently upheld free speech protections and has recently made unpopular decisions that have shown this predisposition towards freedom of expression. Therefore the Act will likely be found invalid. The Act should be revised to mirror a fraud statute in order to deter those who seek to defraud others by claiming honors that they have not received. Through a revised Stolen Valor Act, Congress can punish the criminals at whom the Act

\textsuperscript{153.} Id.
\textsuperscript{154.} Id.
was directed and still protect the freedoms for which our soldiers fight and die.