Jackson Killion

Stolen Valor: A Summary

Introduction

George Washington established the first military medal in 1782.[1] Even then, Washington knew this medal deserved to be protected from people falsely claiming to be recipients.[2] Washington stated, "[s]hould any who are not entitled to these honors have the insolence to assume the badges of them, they shall be severely punished."[3] This article discusses legislation prior to the Stolen Valor Act of 2005 and the legislative history of the Stolen Valor Act. This article also discusses many of the early challenges to the Stolen Valor Act of 2005 as well as *U.S. v. Alvarez*, a case that has recently been granted a writ of certiorari to the Supreme Court. The article concludes with a discussion of a new version of the Act, the Stolen Valor Act of 2011, as well as some analysis on the *Alvarez* case.

I. Legislative History

a. Legislation before the Stolen Valor Act

The Stolen Valor Act of 2005 was not the first attempt by Congress to impose criminal penalties on individuals falsely claiming to have received war medals.[4] The act that originally established Section 704 of title 18 of the U.S.C., which the S.V.A. modified, was based on

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[1] *What is the Purple Heart?* THE MILITARY ORDER OF THE PURPLE HEART http://www.purpleheart.org/PHTrail/Default.aspx (last visited Feb. 9, 2012). This medal would later become the Purple Heart, one of the medals covered by the new provisions in an interesting historical parallel.
[2] *See* General Orders of George Washington Issued at Newburgh on the Hudson, 1782–1783, at 34–35 (Edward C. Boynton ed., 1883) (reprint 1903).
[3] *Id.*
[4] 18 U.S.C. § 704 Historical and Revision Notes (2006). Previous attempts to criminalize the unlawful wearing of certain military medals have existed since 1940 with no major constitutional problems.

section 1425 of title 10 from the 1940 version of the U.S.C.[5] The provision from 1940 entitled "Unlawful, wearing, manufacture, or sale of medals, etc." stated:

> The wearing, manufacturing, or sale of the Congressional Medal of Honor, distinguished-service cross, distinguished-service medal, distinguished-flying cross, soldier's medal, or any other decoration or medal which has been, or may be, authorized by Congress for the military forces of the United States, or any of the service medals or badges which have been, or may hereafter be, awarded by the War Department, or the ribbon, button, or rosette of any of the said medals, badges, or decorations, of the form as is or may hereafter be prescribed by the Secretary of War, or of any colorable imitation thereof, is prohibited, except when authorized under such regulations as the Secretary of War may prescribe.
>
> Any person who knowingly offends against the provisions of this section shall, on conviction, be punished by a fine not exceeding $250 or by imprisonment not exceeding six months, or by both such fine and imprisonment.[6]

A section was created to cover war medals relating to the Navy and War Department in 1948.[7] The following year, the section was further expanded to include any service decoration awarded to any branch of the military.[8] After these two occurrences, in 1952, 18 U.S.C. 704 was codified.[9] It stated:

> Whoever knowingly wears, manufactures, or sells any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof, except when authorized under regulations made pursuant to law, shall be fined not more than $250 or imprisoned not more than six months, or both.[10]

After the 1952 codification as 18 U.S.C. §704, the statute remained basically unchanged for many years.[11] The first significantly changed version appears in the 1994 United States Code. This version of 18 U.S.C. §704 divided the law up into two sections; one dealt with general

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[5] *Id.*
[6] 10 U.S.C. § 1425 (1940).
[7] 1948 U.S.C. supplement 10 U.S.C. § 1425 (1948).
[8] 18 U.S.C. § 704 Historical and Revision Notes (2006).
[9] 18 U.S.C. § 704 (1952).
[10] *Id.*
[11] *See* 18 U.S.C. § 704 (1958), 18 U.S.C. § 704 (1964), 18 U.S.C. § 704 (1970), 18 U.S.C. § 704 (1976) and 18 U.S.C. § 704 (1988).

provisions including improper wearing, manufacturing, or selling of military decorations and the other dealt with provisions specifically focused on the Congressional Medal of Honor.[12]

The specific provisions dealing with the Congressional Medal of Honor increased the possible penalty, if the Medal of Honor is involved, from six months to twelve months.[13] Also, another significant change in an attempt to protect the Medal of Honor was an increase of the fine from $250 to $100000.[14] Additionally, this section defined "sells" to mean, "trades, barters, or exchanges for anything of value."[15] The Congressional Medal of Honor is the highest honor a member of the military can receive.[16] It has only been awarded 3,500 times.[17] Compared to the next highest ranking medals, the Navy Cross, the Distinguished Service Cross (for the Army), and the Air Force Cross, which combined have been awarded almost 20,000 times, the significance and importance of the Congressional Medal of Honor is great. The law remained unchanged for the updated publishing of the United States Code in 2000.[18] New military conflicts and an increase in patriotism soon lead to new, stricter, legislation however.

b. The Legislative History of the Stolen Valor Act

On July 12, 2005, Representative John Salazar addressed the House to discuss the importance of the Medal of Honor and vocalized his respect for past recipients.[19] He noted there were only 121 living recipients of the Medal of Honor.[20] He went on to assert "[t]he Nation's highest award is facing a serious challenge to its meaning and symbol."[21] Salazar expressed his

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[12] 18 U.S.C. § 704 (1994).
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *The Medal of Honor*, THE CONGRESSIONAL MEDAL OF HONOR SOC'Y, http://www.cmohs.org/ (last visited date February 8, 2012).
[17] *Id.*
[18] 18 U.S.C. § 704 (2000).
[19] 151 Cong. Rec. H5643
[20] *Id.*
[21] *Id.*

disapproval regarding the current situation by stating, "I am outraged by the impostors who claim they have received this and other honors the military awards for deeds and actions of soldiers. These criminals not only dishonor themselves, but they dishonor the sacrifice that true recipients have made."[22] After this, Salazar announced his intention to introduce the Stolen Valor Act of 2005 to the House in the coming week.[23] He asserted the legislation would better allow law enforcement officers to prosecute people who falsely alleged they received military medals and "restore the true meaning of these illustrious awards."[24] He then urged the rest of the members of the house to join his effort "to reclaim the meaning of honor and bravery and sacrifice in these United States."[25]

Salazar followed through on his promise and introduced the Stolen Valor Act of 2005 in the United States House of Representatives on July 19, 2005.[26] The bill included findings stating false claims of receiving military medals harmed the reputation and intrinsic meaning of the medals.[27] The findings also included a claim that federal law enforcement officers were "currently limited in their ability to prosecute fraudulent claims of receipt of military medals."[28] Finally, it asserted changes in the current provisions were needed in order to better allow law enforcement officers to "protect the reputation and meaning of these medals."[29] The Stolen Valor Act of 2005 amended section 704 of title 18 of the U.S.C.[30] The changes greatly expanded the punishable activities contained subsection (a) from the original text from only "wears, manufactures, or sells" to "purchases, attempts to purchase, solicits for purchase, mails, ships,

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[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] 151 Cong. Rec. H5643.
[26] H.R. 3352, 109th Cong. (2005).
[27] *Id*. at Sec. 2.
[28] *Id.*
[29] *Id.*
[30] *Id.* at Sec. 3.

imports, exports, produces black certificate of receipt."[31] Additionally, the bill sought to add "attempts to sell, advertises for sale, trades, barters, or exchanges for anything of value' after 'sells'".[32] These two changes more than quadrupled punishable conduct under the provision.[33]

The next major change was the addition of text criminalizing false claims about receipt of medals.[34] This section made it a crime to falsely represent oneself "verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to members of such forces . . . or any colorable imitation thereof."[35] The punishment for this offense included either a fine, imprisonment for six months, or both.[36] The new bill also sought to add specific punishments for some of the most distinguished military awards.[37] In these cases, the maximum punishment allowed was increased from six months in jail to a year in jail.[38]

Kent Conrad introduced the act in the United States Senate on November 10, 2005.[39] The findings listed in the Senate version were not significantly different than those listed in the House version, except for a few minute changes in wording.[40] The Senate version expanded the general criminal offense to cover the same activities as the House version.[41] However, this version called for a change in the definition portion of the Medal of Honor subsection of 18 U.S.C. §704 to include duplicate Medals of Honor and replacement Medals of Honor.[42]

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[31] *Id.*
[32] H.R. 3352, 109th Cong. (2005).
[33] *Compare* 18 U.S.C. § 704 (1994), *with* H.R. 3352, 109th Cong. (2005).
[34] H.R. 3352, 109th Cong. (2005).
[35] *Id.* at Sec. 3
[36] *Id.*
[37] *Id.* The bill created another section entitled "Other Medals" that allowed for an increased punishment if the medal involved in the offense was a Distinguished Service Cross, Air Force Cross, Navy Cross, Silver Star, or Purple Heart.
[38] *Id.*
[39] S. 1998, 109th Cong. (2005).
[40] Compare H.R. 3352, 109th Cong. (2005), with S. 1998, 109th Cong. (2005).
[41] *Id.*
[42] S. 1998, 109th Cong. (2005).

The Senate passed this version of the bill unanimously on September 7, 2006.[43] Following this, the Senate version traveled to the House Judiciary Committee, which was examining the House version of the bill. After some time, the House passed the Senate's version of the Act on December 6, 2006.[44]

II. Early Challenges to the Stolen Valor Act

It did not take long after the passage of the Stolen Valor Act to see cases challenging its constitutionality popping up in courts across the United States. Soon after the Act became law, the government began bringing suit against individuals in violation of it. Many of these individuals challenged the constitutionality of the Act and courts throughout the United States varied on their decisions regarding this constitutionality question.

a. U.S. vs. McGuinn

Louis McGuinn was discharged from the Army as a private but represented himself as a lieutenant colonel and wore unearned service medals, including a Distinguished Silver Cross, a Purple Heart, and a Silver star, without authorization.[45] Based on this information, the Federal government filed a complaint asserting he had violated the Stolen Valor Act.[46] Subsequently, McGuinn filed a motion to dismiss in which he claimed the Stolen Valor Act was unconstitutional because it was overly broad and too vague.[47]

The court examined McGuinn's overbreadth claim.[48] It noted, "a law is unconstitutionally overly broad if it punishes a substantial amount of constitutionally protected

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[43] 151 Cong. Rec. S9215 (2006).
[44] 152 Cong. Rec. H8819 (2006).
[45] United States v. McGuinn, No. 07 Cr. 471(KNF), 2007 WL 3050502, at *1 (S.D.N.Y. Oct. 18, 2007).
[46] *Id.*
[47] *Id.*
[48] *Id.* McGuinn argued the Stolen Valor Act did not "further an important or substantial government interest and it burdened substantially more constitutionally protected speech than necessary." *Id.* The government argued the Act had a broad but legitimate purpose of promoting governmental interest by "recognizing valor in our armed forces and preventing those who have not earned military commendations from wearing them and diluting their value." *Id.*

speech 'judged in relation to the statute's plainly legitimate sweep.'"[49] Conversely, the court recognized that just because an unconstitutional application of a law might be possible, a law is not inevitably overbroad.[50]

The court in *McGuinn* decided to assume, without deciding, McGuinn's action in wearing the medals was constitutionally protected speech but concluded its examination of the overbreadth claim by finding "the government has a legitimate interest in preventing damage to the reputation and meaning of military decorations and medals caused by wearing such medals and decorations without authorization."[51] The court declared the Stolen Valor Act punished only enough constitutionally protected speech to render it constitutional and therefore the Act was not unconstitutionally overbroad.[52]

McGuinn also argued the Act was too vague because it did not provide clear enough guidance as to what is punishable.[53] However, the court declared the Act gave a person of reasonable intelligence adequate notice of what was prohibited by the Act.[54] The court also noted defendants that violate a clearly detailed portion of a statute cannot base their complaint on how a hypothetical situation might affect others.[55] The court found the Stolen Valor Act "can be said to describe the proscribed conduct with mathematical precision, as there is only one determinant of statutory violation: lack of authorization."[56]

McGuinn's wearing of the unearned medals should not be constitutionally protected speech because he claimed to be a rank he never reached, with medals he never earned, to further his commercial transactions. *Id.*

[49] *Id.*

[50] *Id.*

[51] United States v. McGuinn, No. 07 Cr. 471(KNF), 2007 WL 3050502, at *1 (S.D.N.Y. Oct. 18, 2007).

[52] *Id*. at *3. The court found exceptions did exist where one would not be punished under the Act and all one had to do was seek and be granted authorization to not be prosecuted under that law.

[53] *Id*. at 4

[54] *Id*.

[55] *Id*.

[56] *Id*.

Accordingly, the court found the Stolen Valor Act not vague.[57] Because the court also found the Act was not overbroad, the court dismissed the defendant's motion and upheld the constitutionality of the Act.[58]

b. U.S. v. Strandlof

In *U.S. v. Strandlof*, the defendant filed a motion to dismiss information centering on the Stolen Valor Act. The district court examined the motion and concluded "[t]he Stolen Valor Act is [declared] to be facially unconstitutional as a content-based restriction on speech that does not serve a compelling government interest, and consequently that the Act is invalid as violative of the First Amendment."[59]

The government appealed and the United States Court of Appeals for the Tenth Circuit in an opinion published January 27, 2012 reversed the district court's determination and declared the Stolen Valor Act was constitutional.[60] The Court of Appeals stated "[w]e disagree with this reading of Supreme Court precedent and reverse. As the Supreme Court has observed time and again, false statements of fact do not enjoy constitutional protection, except to the extent necessary to protect more valuable speech."[61]

Strandlof never even served in the armed forces, but founded a veterans group and told veterans he was a Marine captain, was wounded in Iraq, and received a purple heart and a silver star.[62] However, many of the veterans questioned the legitimacy of his claims and contacted the government, which resulted in charges being filed against Strandlof for violating the Stolen

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[57] United States v. McGuinn, No. 07 Cr. 471(KNF), 2007 WL 3050502, at *4 (S.D.N.Y. Oct. 18, 2007).
[58] *Id.* at 4–5
[59] United States v. Strandlof, 746 F. Supp. 2d 1183, 1192 (D. Colo. 2010).
[60] United States v. Strandlof, 10-1358, 2012 WL 247995, *1 (10th Cir. Jan. 27, 2012). This case was the latest published decision at the time of writing. The court noted numerous courts throughout the nation had analyzed whether or not the Stolen Valor Act was constitutional and had reached varying results. The court also discussed *Alvarez* and the strong dissents and critical concurrences associated with it. *Id.* at *2
[61] *Id.* at *1
[62] *Id.*

Valor Act.[63] The district court decided the speech regulated by the Stolen Valor Act was not a historic exception of unprotected speech, nor did it survive a strict scrutiny analysis.[64]

On appeal, the court declared, "the Stolen Valor Act survives scrutiny because (1) it restricts only knowingly false statements of fact, and (2) specific characteristics of the statute, including its mens rea requirement, ensure it does not overreach so as to chill protected speech."[65] The court conceded the Stolen Valor Act criminalizes a specific category of speech and therefore it was a content-based restriction on speech.[66] The court also acknowledged the Act had the potential to be excessively far-reaching, but "it has limits."[67]

The court declared the first limit of the Act was the "falsely represents" language found in § 704(b).[68] The court declared the second limit in the Act was "the Stolen Valor Act does not criminalize any satirical, rhetorical, theatrical, literary, ironic, or hyperbolic statements that qualify as protected speech."[69] The court noted this reasoning discredits the slippery slope argument that Congress could regulate any speech and concluded, "[r]ead with these two limitations, only outright lies—not ideas, opinions, artistic statements, or unwitting misstatements of fact—are punishable under the Act."[70]

The court then analyzed the constitutional framework of the Act by examining past Supreme Court precedent.[71] *Strandolf* came to the conclusion that "[s]ince the 1960s, the Supreme Court has repeatedly declared that knowingly false statements of fact, as a category of

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[63] *Id.*
[64] United States v. Strandlof, 746 F. Supp. 2d 1183, 1189–91 (D. Colo. 2010).
[65] United States v. Strandlof, 10-1358, 2012 WL 247995, *at 3 (10th Cir. Jan. 27, 2012).
[66] *Id.* at *4.
[67] *Id.*
[68] *Id.* The court interpreted the "falsely represents" language to "connote[] that to be guilty, a speaker must have had a specific *intent to deceive*" and therefore serve[] as a scienter element.
[69] *Id.* The court declared because the Act requires the intent to deceive, these sort activities cannot be prosecuted. It can hardly be argued an actor or author is trying to deceive his or her audience.
[70] *Id.* at *5.
[71] United States v. Strandlof, 10-1358, 2012 WL 247995, at *5 (10th Cir. Jan. 27, 2012). The court discussed the varied opinions as to what the language in the First Amendment actually meant and noted the First Amendment does not give blanket protection to all speech. *Id.* at *5–*8.

speech, are not generally entitled to full First Amendment protection."[72] The court declared there was a three-part analysis based on Supreme Court precedence to determine if a statute unconstitutionally quells speech.[73] *Strandlof* focused on a "breathing space" standard and stated "[a] restriction on knowingly false factual statements is constitutional so long as it has some limiting characteristic that prevents it from suppressing constitutionally valuable opinions and true statements."[74] The court explained, the "breathing space analysis recognizes that false statements of fact are categorically unprotected for their own sake, and then asks courts to consider whether the challenged legislation impinges on or chills core speech" and declared "the standard of review is straightforward: so long as the legislature leaves breathing space for valuable speech, it may restrict knowingly false statements of fact."[75]

The court concluded the Stolen Valor Act "simply does not encroach on any protected speech" and "even were we to assume the Stolen Valor Act chills some speech, it 'reach[es] no farther than is necessary to protect the legitimate interest involved.'"[76] The court recognized the strong governmental interest in protecting the reputation of military medals and, compared to the risk it chilled speech, found this interest was adequate to rule it constitutional.[77] Accordingly, the court reversed the circuit court's ruling, stated the Act survived strict scrutiny, and declared the Act constitutional.[78]

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[72] *Id.* at 7.
[73] *Id.* at *9. (stating, "[f]irst, we must assess whether a law punishes only *knowingly* false statements. If this is the case, the court must then decide whether the law leaves adequate 'breathing space' for truthful and other fully protected speech. And if a statute survives both of these inquiries but still chills some speech, it is constitutional so long as it reaches no further than necessary to protect the government's legitimate interest.")
[74] *Id.* at *10.
[75] *Id.* at *13.
[76] *Id*. at *17.
[77] United States v. Strandlof, 10-1358, 2012 WL 247995, at *18 (10th Cir. Jan. 27, 2012).
[78] *Id.* There was also a lengthy dissent by Judge Holmes. He interpreted the Supreme Court jurisprudence to mean "injurious falsehood" was the specific historical category of constitutionally unprotected speech and the Stolen Valor Act did not fit in that category. He continued by arguing since the Act did not fall into a historical exception, it must pass a strict scrutiny analysis, which it failed. Consequently, Holmes thought the Act was an unconstitutional restriction on free speech. *Id.* at *43.

c. U.S. v. Perelman

In *United States v. Perelman*, the defendant violated the Stolen Valor Act by wearing a Purple Heart he had not earned or was otherwise authorized to wear.[79] He filed a motion to dismiss that count of the indictment based on a constitutional challenge to the statute, but the court rejected his constitutional challenge and declared the Stolen Valor Act was facially constitutional. [80] After Perelman pleaded guilty and was convicted of the unauthorized wearing of a Purple Heart, he appealed.[81] Perelman argued that any person, other than a valid recipient of a military medal, who wears a medal, is automatically in violation of the statute regardless of the situation.[82] The court noted, "[t]o our knowledge, there are no regulations permitting any person other than the valid recipient to wear a military medal in any circumstances."[83] He contended because of this, multiple instances of harmful conduct and protected speech are unnecessarily prosecuted.[84]

The court disagreed with Perelman's far-reaching reading of the statute.[85] Instead, the appeals court concluded Congress "intended to criminalize the unauthorized wearing of medals only when the wearer *intends to deceive*."[86] The court came to this conclusion because "[b]y prohibiting the wearing of a colorable imitation and by including a scienter requirement, Congress made clear that deception was its targeted harm."[87] Accordingly, the appeals court held

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[79]United States v. Perelman, 737 F. Supp. 2d 1221, 1231 (D. Nev. 2010).
[80] *Id*. at 1238–39.
[81] United States v. Perelman, 658 F.3d 1134, 1134 (9th Cir. 2011).
[82] *Id.* at 1136.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 1137.
[86] *Id.* (Emphasis in original).
[87] United States v. Perelman, 658 F.3d 1134, 1137 (9th Cir. 2011).

the Stolen Valor Act was only violated when the accused had intent to deceive and, because of this, the court found Perelman's overbreadth challenge failed.[88]

During the hearing of the case on appeal, the defendant brought up another Ninth Circuit case, *U.S. v. Alvarez*.[89] The court, at this time, did not know *Alvarez* would be the Stolen Valor Act case that would eventually be brought before the Supreme Court. The discussion of *Alvarez* within *Perelman* is, at the time of writing, the only other discussion of *Alvarez* by the Ninth Circuit. The defendant in *Perelman* argued the earlier decision in *Alvarez*, finding § 704(b) was unconstitutional, obligated the court to conclude § 704(a) was facially invalid.[90]

The court declared "[o]ur decision in *Alvarez* under § 704(b) does not control the question whether § 704(a) is facially overbroad."[91] The court explains this by stating "[w]hereas § 704(b) criminalizes pure speech, § 704(a) criminalizes certain specified activities limited by a scienter requirement.[92] Furthermore, the court identified "[e]ven if we assume that the intentionally deceptive wearing of a medal contains an expressive element—the false statement that 'I received a medal'—the distinction between pure speech and conduct that has an expressive element separates this case from *Alvarez*."[93] *Perelman* used *Alvarez* to support an argument that generally false speech is constitutionally protected but statutes criminalizing fraud or impersonation are constitutional because the statutes only target genuine criminal acts.[94]

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[88] *Id.* at 1138.
[89] *Id.* at 1139.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] United States v. Perelman, 658 F.3d 1134, 1139 (9th Cir. 2011).
[94] *See Id.* The *Perelman* court used *Alvarez*'s determination that certain statutes regarding false speech are constitutional because they target "legitimately criminal conduct" to support their argument that, because § 704(a) criminalized this specific conduct, it was constitutional.

The court decided the government had a "compelling interest" in prohibiting the "intentionally deceptive wearing of medals."[95] It decided these governmental interests are "unrelated to the freedom of expression."[96] Accordingly, *Perelman* concluded, "§ 704(a) does not prevent the expression of any particular message or viewpoint. Instead, § 704(a) promotes compelling governmental interests by barring fraudulent conduct."[97] Most importantly the *Perelman* court stated, "Supreme Court precedent strongly suggests that § 704(a) survives First Amendment scrutiny."[98]

Perelman is important because it refused to hold the Stolen Valor Act facially unconstitutional as a whole even though *Alvarez* found § 704(b) of the Stolen Valor Act facially invalid. The *Perelman* court refused to let *Alvarez* control its decision and in fact used *Alvarez* to support its conclusion regarding § 704(a) of the Stolen Valor Act.[99] The *Perelman* court rejected the facial challenge to § 704(a) and found that it was constitutional.[100]

d. U.S. v. Robbins

The defendant moved to quash an indictment charging a violation of the Stolen Valor Act.[101] He argued that it violated his right to free speech, but the court found the activity punished by the Act fell outside of traditionally protected speech and denied the motion to quash.[102]

Robbins served in the Army for a few years but was never in combat or overseas and was never awarded any military medals but he was a member of the Veterans of Foreign Wars, which

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[95] *Id.* at 1140.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 1139.
[99] United States v. Perelman, 658 F.3d 1134, 1138 (9th Cir. 2011).
[100] *Id.* at 1140.
[101] United States v. Robbins, 759 F. Supp. 2d 815, 816 (W.D. Va. 2011).
[102] *Id.* at 816, 822.

required members to have served in an overseas conflict.[103] Robbins ran for a local political office and produced and distributed campaign material alleging he received a Vietnam Service Medal and a Vietnam Campaign Medal.[104] He wore unearned medals on his uniform while attending certain events as part of the VFW honor guard and falsified documentation regarding his military history, which he provided to the VFW.[105] Additionally, he provided falsified documents to a local newspaper as proof of his receipt of the military medals.[106]

The court declined to follow two previous decisions finding the Stolen Valor Act unconstitutional and instead noted, "[t]he general exclusion of false statements from First Amendment protection is consistent with Supreme Court cases dealing not only with defamation, but also with fraud."[107] The government acknowledged, "the statute should be read to criminalize only knowingly false statements" and by acknowledging this stipulation, the Stolen Valor Act cannot be read to punish anything short of intentionally false and deceptive statements.[108] This means false statements made in movies, parodies, exaggerations, etc. will not be punishable but instead, "[r]ead with these limitations, only outright lies, not ideas, are punishable."[109]

The court concluded the speech the Stolen Valor Act criminalizes fell into none of the categories of "speech that matters" and therefore did not require First Amendment protection.[110] Subsequently, the purpose of the act to protect the reputation of the medals by criminalizing false claims about them was a valid one and"[r]estricting such statements supports military discipline and effectiveness, a legitimate legislative concern under the Constitution."[111] Therefore, *Robbins*

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[103] *Id.* at 817.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] United States v. Robbins, 759 F. Supp. 2d 815, 817–18 (W.D. Va. 2011).
[108] *Id.*
[109] *Id.* at 819.
[110] *Id.* at 819–20.
[111] *Id.* at 821.

held the restrictions contained in the Stolen Valor Act fell outside of the scope of traditional First Amendment protection and consequently the Act was constitutional and denied the motion to quash the indictment.[112]

III. *U.S. v. Alvarez*

U.S. v. Alvarez is the most important case dealing with the constitutionality of the Stolen Valor Act presently. Xavier Alvarez was convicted of falsely claiming to have received the Congressional Medal of Honor and therefore violating the Stolen Valor Act.[113] He successfully challenged the constitutionality of the Stolen Valor Act,[114] the government appealed this decision, and subsequently the case was granted a writ of certiorari to the Supreme Court.[115]

a. Factual Background

Alvarez was elected to a position on the board of directors for his water district.[116] During a meeting with another nearby water district, he proclaimed he was a marine for twenty-five years, received the Medal of Honor, and had been wounded multiple times in the course of combat.[117] All of these claims were outright lies; he had never even been in any military service branch.[118]

After the water board meeting, he was indicted under the Stolen Valor Act.[119] He claimed the Act was unconstitutional and moved to dismiss his indictment, but the district court denied this motion.[120] Consequently, Alvarez pleaded guilty to falsifying his claim of receiving the Medal of Honor, but it was a conditional plea in which he retained a right to appeal the Stolen

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[112] *Id.* at 822.
[113] United States v. Alvarez, 617 F.3d 1198, 1201 (9th Cir. 2010).
[114] *Id.* at 1201.
[115] *See* United States v. Alvarez, 132 S. Ct. 457, 181 L. Ed. 2d 292 (2011).
[116] United States v. Alvarez, 617 F.3d 1198, 1200 (9th Cir. 2010).
[117] *Id.*
[118] *Id.* at 1200–01.
[119] *Id.* at 1201.
[120] *Id.*

Valor Act's constitutionality.[121] Alvarez utilized this appeal and challenged the Act by claiming it was both facially unconstitutional and was unconstitutional as applied.[122]

b. The Majority's Analysis of the Stolen Valor Act.

i. Historical Protection Analysis

The government argued the speech covered in the Act fell into the historical category of false speech, which is constitutionally unprotected.[123]However, the court contended, "it has long been clear that First Amendment protection does not hinge on the truth of the matter expressed" but it agreed First Amendment protection does not extend to all false speech.[124] The court also shied away from the government's argument because it thought if it were to follow it, it " would give it license to interfere significantly with our private and public conversations."[125] The court noted, if it did in fact follow the government's argument, the consequence would be a greatly weakened First Amendment.[126] There would be no criteria establishing which lies had enough value to deserve First Amendment Protection and which lies fell short.[127]

Alvarez claimed courts "presumptively protect *all* speech against government interference" and it is the government's burden, and a tough one at that, to attempt to rebut this presumption.[128] The court recognized this practice might lead to protecting lies that are nothing more than a unpleasant misapplication of free speech, but simultaneously recognized "it is constitutionally required because the general freedom from government interference with speech, and the general freedom to engage in public and private conversations without the government

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[121] *Id.*
[122] United States v. Alvarez, 617 F.3d 1198, 1201 (9th Cir. 2010).
[123] *Id.* at 1202.
[124] *Id.* at 1203
[125] *Id.* at 1204
[126] *Id.*
[127] *Id.*
[128] United States v. Alvarez, 617 F.3d 1198, 1205 (9th Cir. 2010).

injecting itself into the discussion as the arbiter of truth, contribute to the 'breathing space' the First Amendment needs to survive."[129]

The court must interpret questions regarding the First Amendment privilege this way to protect a free exchange of ideas instead of constructing an atmosphere of caution and restraint where people are scared an honest mistake could lead to a serious punishment.[130] However, *Alvarez* acknowledged, while false statements even of little value may be constitutionally protected, "the *knowingly* false statement ... do[es] not enjoy constitutional protection."[131]

For the speech criminalized by the Stolen Valor Act to fall into a category of speech that can be restricted without any constitutional complications, the speech restricted by the Act must fall into "historical and traditional categories long familiar to the bar."[132] The court explored the idea of analogizing the case at hand with the historical category of defamation suits.[133] It explained, in this type of suit, speech is not restricted strictly because it is false, but instead is restricted because it is false *and* defames someone.[134] The court noted personally damaging false statements in a defamation claim lose constitutional protection without any constitutional challenge because the statements fit into a category of historically barred speech, but it cannot be said that false statements of fact, generally, outside of the area of defamation, fall into the same category.[135] Because of this, courts are hesitant to withdraw First Amendment protection to

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[129] *Id.* at 1206.
[130] *Id.* at 1207.
[131] *Id.* quoting Garrison v. Louisiana 379 U.S. 64, 75 (1964) (emphasis in original).
[132] *Id.* quoting United States v. Stevens, 130 S. Ct. 1577, 1584 (2010).
[133] *Id.* at 1206–1211.
[134] United States v. Alvarez, 617 F.3d 1198, 1207–08 (9th Cir. 2010). If the speech is only false it still maintains its First Amendment protection unless it can be shown the statement causes irrevocable damage to one's name.
[135] *Id.* at 1208–09.

statements criminalized under the Act based strictly on defamation jurisprudence.[136] Instead, the creation of new categories not privy to First Amendment protection must be carefully done.[137]

The court then analyzed whether or not statements criminalized under the Stolen Valor Act could fall under the category of defamation, a historic category of constitutionally unprotected speech, and therefore avoid a constitutional questioning on its restrictions.[138] However, under the language of the Stolen Valor Act, no specific intent or state of mind is required for one to violate the Act, unlike defamation statutes.[139] Because of this, the court saw a problem with allowing the speech criminalized by the Act to fall into the defamation category of unprotected speech, since it might punish negligently made false statements.[140]

The government attempted to sidestep this problem; it "preemptively suggested at oral argument that a scienter requirement can be read into the Act."[141] This suggestion called for a government obligation to prove the alleged offender acted with malice in making his or her claims or wearing the medals.[142] For a fleeting second, the court seemed to give this argument a chance by acknowledging, "[i]f a scienter requirement would save the statute, we would be obliged to read it in if possible" and further conceding "[s]uch an approach might be reasonable since most people know the truth about themselves, thereby permitting us to construe the Act to require a knowing violation" before refusing to take this approach[143]

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[136] *Id.* at 1208.
[137] *Id.* at 1209.
[138] *Id.* at 1209–11.
[139] *Id.* at 1209.
[140] United States v. Alvarez, 617 F.3d 1198, 1209 (9th Cir. 2010).
[141] *Id.*
[142] *Id.*
[143] *Id.*

In fact, Alvarez *was* charged with knowingly making the false statements regarding military distinctions[144] but the court concluded defamation cannot be found "merely for spreading knowingly false statements" and instead the specific statements being spread must be harmful to an identifiable individual.[145] The court refused to acknowledge the damage done to the reputation of military medals highlighted in the congressional findings was sufficient to meet this harm requirement and consequently qualify the Stolen Valor Act as a defamation statute.[146] Subsequently, the court refused to place the Stolen Valor Act in the defamatory historic category of exceptions.[147] The court also refused to include the speech restricted by the Act in the historical exceptions of fraud, perjury, or impersonation. [148] Accordingly, the majority found interpreting Supreme Court precedence to allow for broad criminalization of factually false speech cannot constitutionally succeed and, for this reason, the Act falls in no other preexisting historical category.[149]

ii. Strict Scrutiny Analysis

The court then determined it must examine the Act with a strict scrutiny analysis and, in order for the Stolen Valor Act to pass this examination, it must be drawn narrowly and only attempt to criminalize non-protected speech.[150] There is a great concern that, if the government exceeds this limitation and encroaches on speech, First Amendment rights might be violated and "[b]ecause First Amendment freedoms need breathing space to survive, government may

[144] *Id.* The majority blatantly acknowledged this by stating, "[i]ndeed, the government charged Alvarez with knowingly making the false statement." *Id.*
[145] *Id.* 1209–10.
[146] United States v. Alvarez, 617 F.3d 1198, 1210–11 (9th Cir. 2010).
[147] *Id.* at 1211.
[148] *Id.* at 1211–14. The court decided in those types of cases a scienter requirement is present and actual damage must occur, but neither of these requirements are found in the Stolen Valor Act.
[149] *Id.* at 1214.
[150] *Id.* at 1215.

regulate the area only with narrow specificity.[151] The court in *Alvarez* was even more cautious examining the constitutionality of the Stolen Valor Act because it was unsure if the Act actually only regulated unprotected speech or extended punishment further.[152]

The court acknowledged the interest asserted by the government was a noble one, but the Stolen Valor Act was not a narrowly enough tailored means of achieving this goal.[153] The majority decided Alvarez's claim about the receipt of military decorations did not need to be punished speech, but instead his false claims would be better dealt with by more speech, specifically other individuals coming forward showing Alvarez's claims to be false and the humiliation that would result.[154] Therefore, the majority found the Act to be unconstitutional.[155]

c. Bybee's Lengthy dissent in *Alvarez*

Bybee's dissent of the decision in *Alvarez* pulled no punches and many other court's have found his words persuasive. Judge Bybee argued false statements of fact deserve no constitutional protection.[156] He quoted a previous Supreme Court decision, which stood for the proposition that, "false statements of fact ... belong to th[e] category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[157] Bybee stated, "[t]he Court has stated *as plain as words permit* that 'the erroneous statement of fact is not worthy of constitutional protection.'"[158]

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[151] *Id.* at 1216.
[152] United States v. Alvarez, 617 F.3d 1198, 1216 (9th Cir. 2010).
[153] *Id.* at 1218.
[154] *Id.* at 1217.
[155] *Id.* at 1218.
[156] *Id.* at 1218–19.
[157] *Id.* at 1218.
[158] United States v. Alvarez, 617 F.3d 1198, 1218(9th Cir. 2010) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)(emphasis added).

Bybee argued First Amendment protection is not a given for false speech, but instead this speech needed to be "speech that matters" to garner the Constitutional protection.[159] Bybee contended he could not understand how, given the extensive Supreme Court precedent dealing with false statements of fact not qualifying for First Amendment protection, the majority found there was *no authority* supporting the idea that false statements fell into a category of historically unprotected speech.[160] Bybee also failed to see how the majority, given the same Supreme Court precedent, decided false statements of fact were presumptively protected.[161] Bybee seemed to find humor in the majority's faulty reasoning in their decision:

> The majority then moves from this faulty principle to an even more remarkable one: after repeating the Court's statement in *Garrison* that " 'the *knowingly* false statement ... do[es] not enjoy constitutional protection,' " the majority holds that Alvarez's *knowingly* false statement of fact is entitled to *full* constitutional protection, and therefore that the court is "required to apply the highest level of scrutiny in [its] analysis" of the Act.[162]

Bybee after pointing out all of these logical flaws in the majority's argument noted he would find the Stolen Valor Act was constitutional in the case at hand.[163]

i. False Statements are Historically Unprotected

Bybee believed the majority "turned the exceptions into the rule and the rule into an exception."[164] He declared, "the general rule is that false statements of fact are not protected by the First Amendment."[165] This declaration is in stark opposition to what the majority decided, but Bybee did recognize there was an exception to this rule if the speech fell under the category of "speech that matters."[166]

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[159] *Id.* at 1219
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.* at 1241.
[164] United States v. Alvarez, 617 F.3d 1198, 1219 (9th Cir. 2010).
[165] *Id.* at 1220.
[166] *Id.* at 1221.

Bybee had great trouble accepting the majority's argument that there was no authority that stood for the proposition that false statements of fact were not generally in a category of unprotected speech and were actually "speech that matters."[167] He also disagreed with the majority's argument that the First Amendment presumptively protects false statements of fact.[168] Bybee felt that instead of the court reading specifically what the Supreme Court has held, the majority decided to give the Supreme Court's words their own meaning in reaching these conclusions.[169]

Instead of strictly going by what the Supreme Court decided in *Gertz v. Robert Welch, Inc.*, namely false statements of fact merit no constitutional protection, the majority decided to declare the Supreme Court really only *meant* defamation.[170] This limited the holding that the Supreme Court intended in *Gertz* and allowed the majority to exclude generally false statements of fact from a defamation as a category of historically unprotected speech.[171] According to Bybee, the majority's decision that fraud and defamation are the historically unprotected categories is incorrect and instead these areas fall into a larger general category of false factual statements. [172]

Bybee thought it was wrong to rest the *Alvarez* opinion on what the court *thinks* the Supreme Court meant instead of what it *actually* said and argued as a lower court, they had no standing to limit a Supreme Court holding in this way.[173] If in fact the Supreme Court meant for

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[167] *Id.* at 1222.
[168] *Id.* at 1223.
[169] *Id.*
[170] United States v. Alvarez, 617 F.3d 1198, 1223 (9th Cir. 2010). *Gertz* was a Supreme Court case dealing with defamation. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The majority spent some time criticizing the dissents analysis of what *Gertz* exactly held. United States v. Alvarez, 617 F.3d 1198, 1202–04 (9th Cir. 2010). It squabbled over if *Gertz* actually held false statements were generally unprotected or if it held false speech generally was protected and certain requirements must be met to lose this protection. *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*

courts to interpret in this limited way, it would have "used the terms 'defamation' or 'libel' rather than 'false statements of fact' to describe the unprotected category of speech-it presumably knew what these terms mean-but it did not."[174]

Bybee further argued, the fact that many of the Supreme Court cases the majority discussed dealt specifically with fraud or defamation does not necessarily mean these two areas are the specific historical categories of speech without protection.[175] On the contrary, the Court's use of "false statements of fact" specifically within these cases as unprotected speech signals both of these areas are encompassed by "false statements of fact" as *the* historically unprotected category generally.[176] Bybee asserted, to fail to interpret the cases in this way would mean that the Court silently overruled years of Supreme Court precedent dealing with "false statements of fact" as a category of historically unprotected speech.[177]

Bybee believed the majority unfairly criticized him by asserting he was attempting to create a new historical category of unprotected speech, which was in direct conflict with precedent reigning in a court's ability to create new categories of unprotected speech.[178] *Alvarez* however, only concerns false statements of fact, which, as previously discussed, have long been recognized to be a historically unprotected class of speech and therefore "no 'expansion' of First

[174] *Id*. Bybee went even farther, stating "[e]ven if we had the authority to limit the Supreme Court's statements to what we think they mean rather than what they actually say, the Supreme Court did (and does) mean that "false statements of fact" are generally unprotected and that (non-satirical and non-theatrical) knowingly false statements of fact are always unprotected. Supreme Court precedent, Ninth Circuit precedent, and logic compel this conclusion."
[175] United States v. Alvarez, 617 F.3d 1198, 1223 (9th Cir. 2010).
[176] *Id.*
[177] *Id.*
[178] *Id.* at 1226.

Amendment jurisprudence is necessary to hold that Alvarez's false statements are not protected."[179]

Bybee did not fail to recognize there were exceptions where false speech would be protected.[180] He asserted these few exceptions were narrowly defined within the general rule that false statements of fact are generally not protected.[181] But, instead of following this reasoning, Bybee believed the majority allowed the exceptions to become the rule and the rule to become the exception, contrary to years of First Amendment precedent from the Supreme Court.[182]

The majority's approach of analyzing this Supreme Court precedent was questionable and the position the majority chose to take after this analysis amounted to essentially either turning a blind eye on years of precedent contradictory to their decision or effectively attempting to overrule it.[183] Bybee asserted, "I cannot see how *Gertz* could have meant 'defamation' when it said that 'false statements of fact' are unprotected. If that were true, there would be nothing left of *Gertz*'s statement that false statements of fact fall outside of First Amendment protection."[184] Bybee believed this interpretation made "the exception . . . swallow[] up the rule."[185]

Bybee also thought the majority incorrectly found a false statement must cause harm to lose constitutional protection and instead a court, in lieu of looking at harm resulting from the false statement, should focus on if the speech has historically been thought to be of little or no value to the societal free exchange of ideas.[186] According to Bybee, if a court finds the latter is true, and the speech is in fact of little or no value, the harm done is basically irrelevant and

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[179] *Id.* Bybee even noted the jurisprudence of the Court of Appeals for the Ninth Circuit was "in accord with the principle that false statements of fact (not just defamatory or fraudulent false statements) are generally unprotected by the First Amendment"

[180] *Id.*

[181] United States v. Alvarez, 617 F.3d 1198, 1223 (9th Cir. 2010).

[182] *Id.*

[183] *Id.*

[184] *Id.* at 1227.

[185] *Id.*

[186] *Id.*

unnecessary to analyze.[187] While it is true in defamation cases there generally must be some sort of harm to bring suit, Bybee argued this did "not demonstrate that a cognizable harm is a *prerequisite* before a false statement of fact loses its First Amendment protection."[188]

Bybee pointed to obscenity jurisprudence to illustrate the contradiction in the majority's harm requirement.[189] Precedent shows obscene speech has long been a category of speech vacant of constitutional protection because the speech is "utterly without redeeming social importance."[190] This *alone* is sufficient for the speech to be stripped of any First Amendment protection *even absent the showing of some sort of "harm."*[191] In fact, the analysis when dealing with obscenity can do without any mention of actual harm, as long as it can be shown the speech has little or no societal value.[192]

Regardless, contradiction is once again apparent in the majority's argument. The majority required proof from the government that harm was done to the reputation of the military medals, while at the same time recognizing false statements about receipt of medals "damage the reputation and meaning of decorations and medals."[193] However, why does the government need to prove harm is done to restrict speech under the Stolen Valor Act but not under obscenity legislation? Why should it be that both laws attempt to target a perceived harm, yet obscenity legislation requires no governmental proof to restrict speech, but is constitutional, while the Stolen Valor Act must in fact meet this requirement to be constitutional? The majority itself recognized false statements such as Alvarez's could be hurtful to the reputation of a governmental interest, namely the protection from damage of the reputation of military medals

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[187] *Id.* at 1228.
[188] United States v. Alvarez, 617 F.3d 1198, 1228 (9th Cir. 2010).
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.* Bybee found nothing in Supreme Court precedence where a definition of obscenity included or required harm.
[193] *Id.* at 1209–10.

and further noted “honoring and motivating our troops are doubtless governmental interests.”[194] As Bybee stated, “the Court's obscenity jurisprudence demonstrates that a ‘harm’ requirement simply does not exist in terms of the protection afforded a category of speech” and it makes no sense to arbitrarily add this requirement in this case.[195] Additionally, even if the majority’s harm requirement was accepted, the majority itself recognized false statements, such as Alvarez’s, do “damage”.[196]

Bybee further questioned the majority’s similarly flawed reasoning where they relied heavily on fraud statutes to conclude harm must be established in order to restrict speech.[197] It is not a logical conclusion to assume, since certain statutes regarding areas of fraud *may* require a showing of harm, the Stolen Valor Act must also contain this requirement to be constitutional.[198] In, *Illinois ex rel. Madigan v. Telemarketing Associates*, the Supreme Court held the First Amendment did not protect speech that was intended to mislead or deceive.[199] The majority pointed to this case in its analysis to argue, “[f]raud statutes must be precisely crafted to target only specific false statements that are likely to cause a bona fide harm.”[200] However, the Court in *Madigan* never mentioned “harm” *even once* in their opinion.[201] Furthermore, that same Court asserted, “[l]ike other forms of public deception, fraudulent charitable solicitation is unprotected speech.”[202] It would seem Alvarez’s public decree he received certain military decorations would

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[194] United States v. Alvarez, 617 F.3d 1198, 1217 (9th Cir. 2010).
[195] *Id.* at 1229.
[196] *Id.* at 1209–10.
[197] *Id.* at 1230.
[198] *Id.* at 1231. Bybee noted, “although the Supreme Court has held that fraudulent statements are not entitled to First Amendment protection, it stretches logic to conclude from these holdings that a cognizable injury is *necessary* for a category of speech to fall outside First Amendment protection.” *Id.* at 1230.
[199] 538 U.S. 600, 612 (2003).
[200] United States v. Alvarez, 617 F.3d 1198, 1211 (9th Cir. 2010).
[201] *See* Ill. ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600 (2003).
[202] *Id.* at 612.

also constitute public deception, an unprotected category of speech, as made evident by *Madigan*. Here again the majority's argument falls flat.

ii. The Stolen Valor Act – as applied

Bybee pointed out "Alvarez does not deny that his statement that he received the Congressional Medal of Honor was a statement of fact, that this statement was false, and that he made the statement with full knowledge of the statement's falsity."[203] Alvarez's statement was a calculated lie; a knowingly false statement. As previously illustrated, Supreme Court precedent generally excludes knowingly false statements from First Amendment protection. Furthermore, Alvarez's speech is not "speech that matters" so it should not gain this protection. Since the false statements of fact Alvarez made fall into a category of historically unprotected speech, "there is no need to apply strict scrutiny."[204]

Nevertheless, the majority applied a strict scrutiny analysis in its examination of the Act and found the Stolen Valor Act, as applied, was unconstitutional for two reasons, the first of which was it required no malice or scienter element. According to Bybee however, the requirement of ""actual malice" the majority cited to does not extend to private individuals.[205] However, assuming *arguendo*, the majority is right in requiring this malice, Alvarez still knowingly deceived members of the meeting as well as individuals who may have voted for him, which *is* "actual malice".

Bybee, did not believe the "actual malice" requirement established by *New York Times* to show defamation to a public figure, applied to the false statements by Alvarez.[206] Alvarez's statements do not defame a public official and therefore there is no need to worry about one of

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[203] United States v. Alvarez, 617 F.3d 1198, 1231 (9th Cir. 2010).
[204] *Id.* at 1232.
[205] *Id.*
[206] *Id.* at 1232–33.

the primary reasons the "actual malice" standard was created, "to prevent defamation from being used by public officials as a civil substitute for criminal sedition."[207] Because of the reasoning given by the court in *New York Times*, it is not necessary to extend the reasoning of that case to *Alvarez* and the defamation dealt with in *New York Times* should not control suits dealing with "false self-promotion" such as *Alvarez*.[208]

The majority's second reason for deciding the Act was unconstitutional in its "as applied" analysis was that the Act did not require Alvarez's false statements to cause "irreparable" harm.[209] Bybee argued that nothing in the First Amendment or Supreme Court jurisprudence required "irreparable" harm and "thus the Act's failure to require harm is irrelevant to the determination of whether it is unconstitutional."[210] However, even giving the majority the benefit of the doubt that irreparable harm is a requirement, the congressional findings report the false statements of receipt of military medals, such as Alvarez's, "damage the reputation and meaning of such decorations and medals."[211] Nonetheless, it seemed the majority decided the congressional findings were not adequate and instead made their own findings.

Bybee did not believe it was necessary to prove on a case-by-case basis that an individual's false statements regarding the receipt of military medals caused harm to the reputation of those medals.[212] Based on obscenity jurisprudence, the Supreme Court has stated, "[f]rom the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs."[213] Furthermore, the Supreme Court noted, "The fact that a congressional

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[207] *Id.*
[208] *Id.* at 1233.
[209] United States v. Alvarez, 617 F.3d 1198, 1207 (9th Cir. 2010).
[210] *Id.* at 1233.
[211] STOLEN VALOR ACT OF 2005, PL 109–437, December 20, 2006, 120 Stat 3266.
[212] United States v. Alvarez, 617 F.3d 1198, 1234 (9th Cir. 2010).
[213] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973).

directive reflects unprovable assumptions about what is good for the people . . . is not a sufficient reason to find that statute unconstitutional."[214] There is no reason for the court in *Alvarez* to stray from this reasoning, especially by arbitrarily supplanting the congressional findings with unsubstantiated findings of their own.

Even accepting the harm requirement the majority called for *arguendo*, given the majority's opinion, it is not exactly clear what measure of harm it takes to meet their standard. As Bybee pointed out, "the majority itself concedes that Alvarez's statement was a 'deliberate and despicable [lie]," that it was a 'worthless, ridiculous, and offensive untruth[ ].'[215] But yet even though Alvarez's false statements were "offensive", "worthless" and "despicable" the majority still found the statements did not reach the standard. Bybee argued, "Alvarez's statements dishonor every Congressional Medal of Honor winner, every service member who has been decorated in any way, and every American now serving" and the congressional findings seem to agree with Bybee's statement, but yet the court still found Alvarez's knowingly false factual statements do not do enough harm to qualify.[216] It is very unclear, given the majority's opinion just how far speech needs to go to qualify as causing enough "reputational harm" to lose First Amendment protection. It is hard to imagine a more harmful example of false factual speech in this case that the majority would actually conclude causes the appropriate amount of harm.

In fact, Bybee presumed the majority reasoned no application of the Stolen Valor Act could be interpreted to be constitutional.[217] However, the Supreme Court has held statutes, which may appear unconstitutionally overbroad, can be saved if a "limiting construction . . . could be

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[214] *Id.* at 62.
[215] United States v. Alvarez, 617 F.3d 1198, 1234 (9th Cir. 2010).
[216] *Id.* at 1235.
[217] *Id.* at 1237.

placed on the challenged statute."[218] The Supreme Court will always attempt to save a statute from unconstitutionality if a limiting construction can save it or the statute can reasonably be read to be constitutional. In *Alvarez*, it would seem a limiting construction, such as the scienter requirement malice must be shown that the government suggested, could be read into the text of the statute, which could quash the unconstitutionally overbroad objections from majority.

Finally, Bybee attacked the majority's argument that the Act, as currently constructed, could lead to mistaken punishment in some instances.[219] However, it is hard to imagine an instance where the government would pursue an individual who did not actively state he or she received a military decoration when the individual knew this was incorrect. Bybee pointed out, "Alvarez and the majority have failed to identify a *single instance* in which the Act has been applied in a context other than Alvarez's: a simple lie about receiving a military honor."[220] In fact, no cases were available at the time of writing where the government has attempted to punish an individual under the Stolen Valor Act who did not knowingly lie about his or her receipt of a military medal.

These facts seem to make it obvious what conduct is punishable under the act. Basically, to not face government prosecution under the Stolen Valor Act, all one needs to do is refrain from knowingly lying about receiving a military medal. Therefore, the sweep of the Act is narrow; no speech loses constitutional protection except blatant lies about the receipt of a medal, when one knows the statement is untrue. Bybee felt the majority's opinion would be interpreted to overrule years of Supreme Court precedent.[221] The majority's opinion meant the general rule that false statements of fact do not garner First Amendment protection was reversed and even

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[218] Broadrick v. Oklahoma, 413 U.S. 601, 618 (1973).
[219] United States v. Alvarez, 617 F.3d 1198, 1238–40 (9th Cir. 2010).
[220] *Id*. at 1238.
[221] *Id*. at 1240 (emphasis added).

knowingly false statements received constitutional protection. Bybee concluded the majority's opinion "strikes down an act of Congress on its face despite the most important consideration to this case: no person has ever been subjected to an unconstitutional prosecution under the Stolen Valor Act and, under any reasonable interpretation of the Act, it is extremely unlikely that anyone ever will be."[222]

d. Aftermath – Denial of Rehearing

The government appealed the majority's decision and filed a petition for a rehearing en banc.[223] This petition was subsequently denied.[224] However, Bybee voted to grant the petition and two other judges wrote dissenting opinions regarding this decision.[225]

i. Concurrence by Judge Smith, Jr.

Smith thought the dissenters focused too much on recent Supreme Court cases and overlooked past hesitancy to hold all false statements forfeit First Amendment protection.[226] Smith argued "speech that matters" must be protected and, because of this argument, the government needed to show fault by a defendant, an argument attacked by Bybee in the original opinion.[227] Hypocriticalness is evident in this argument because, in the original case, which the court was denying rehearing, the majority specifically noted the statement made by Alvarez was a "worthless . . . untruth[]" but now once again argued it "mattered" and was worth protecting.[228]

Smith disagreed with the idea that, as a general rule, false statements of fact do not have constitutional protection put forth by Bybee and O'Scannlain.[229] Smith argued, "defamatory statements are unprotected if they are *made with a culpable state of mind and cause injury* to

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222 *Id*.
223 United States v. Alvarez, 638 F.3d 666, 666 (9th Cir. 2011).
224 *Id*.
225 *Id*
226 *Id*. at 668.
227 *Id*.
228 United States v. Alvarez, 617 F.3d 1198, 1234 (9th Cir. 2010).
229 United States v. Alvarez, 638 F.3d 666, 669 (9th Cir. 2011) (emphasis in original).

another person."[230] As applied, it would seem Smith would concede Alvarez had a culpable state of mind but his statements failed to cause injury *to another person*.[231] It might be true no specific person is proximately injured, but the court repeatedly admitted statements such as Alvarez's cause harm to the reputation of the military decorations and it would seem to follow the same statements also cause harm to the people who receive the decorations.

ii. Chief Judge Kozinski's concurrence

Judge Kozinski also disagreed with the dissenters' proposition that the general rule was knowingly false statements lack constitutional protection.[232] He argued to agree with the dissenters would be to begin a descent down a slippery slope of eroding white lie protection.[233] Kozinski noted Alvarez was speaking about himself, and "[s]peaking about oneself is precisely when people are most likely to exaggerate, obfuscate, embellish, omit key facts or tell tall tales. Self-expression that risks prison if it strays from the monotonous reporting of strictly accurate facts about oneself is no expression at all."[234]

Kozinski added, lying is part of living, it is something we do almost every day; it is human nature.[235] He declared being able to decide when to tell the truth about one's self was "[a]n important aspect of personal autonomy" and fell back on the argument made by Alvarez, that if the government could punish all lies, people would greatly censor their speech and the free exchange of ideas would be hampered.[236]

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[230] *Id.*
[231] *Id.*
[232] *Id.* at 673–76.
[233] *Id*. at 673.
[234] *Id*. at 674.
[235] United States v. Alvarez, 638 F.3d 666, 673 (9th Cir. 2011) (emphasis in original).
[236] *Id.* at 674.

This was not what the government sought in passing the Stolen Valor Act, nor what would likely happen, however.[237] The minute chance a law might precede other laws, which in turn may have unconstitutional reach, does not mean that that law should be struck down.[238] If this were the case, almost every law Congress has ever passed could be constitutionally challenged. A court should not merely focus on hypothetical applications of future laws bearing a resemblance to the Stolen Valor Act to determine the Act's constitutionality.

iii. O'Scannlain's dissent

Judge O'Scannlain was joined by six other Circuit Judges in his dissent.[239] He argued, just as Bybee did originally, "the court's opinion is not merely unprecedented; rather, it runs counter to nearly forty years of Supreme Court precedent."[240] Not surprisingly, Bybee joined O'Scannlain on his dissent.[241]

O'Scannlain believed, "the majority ignored a straightforward aspect of First Amendment law: the right to lie is not a fundamental right under the Constitution."[242] Since the right to lie is not a constitutionally protected right, the majority should not have even used a strict scrutiny analysis, regardless of whether the Stolen Valor Act would have survived it or not.[243] Just as Bybee did in his earlier dissenting opinion, O'Scannlain exposed the hypocritical nature of the majority's decision by exposing the fact that the same court, which throughout this case has

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[237] *See* STOLEN VALOR ACT OF 2005, Pub. L. No. 109–437, 120 Stat 3266, §2 "Findings" (2006). Congress declared "legislation action is necessary to permit law enforcement officers to protect the reputation and meaning of military decoration and medals." *See also* 152 Cong. Rec. S2266. Senator Conrad stated "I again want to assure . . . the Stolen Valor Act is only directed at those who fraudulently use military service awards and decorations."
[238] *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 584 (1998) A large amount of hypotheticals can be imagined in an attempt to challenge any legislation however this court stated "we are reluctant, in any event, to invalidate legislation on the basis of its hypothetical application to situations not before the Court."
[239] United States v. Alvarez, 638 F.3d 666, 677 (9th Cir. 2011).
[240] *Id*. at 677. Bybee noted, in his dissent in the original case, for the last sixty years the Supreme Court has refused to extend protection to statements like Alvarez's and the majority was basically overturning this long-lasting jurisprudence. United States v. Alvarez, 617 F.3d 1198, 1238–40 (9th Cir. 2010).
[241] United States v. Alvarez, 638 F.3d 666, 677 (9th Cir. 2011).
[242] *Id*. at 678.
[243] *Id*.

argued false statements do not generally lack First Amendment protection, previously stated "false statements are not deserving, in themselves, of constitutional protection" but instead "constitutional protection is afforded [to] [only] *some* false statements."[244] This declaration would seem to support the dissenters' proposition the rule is false statements of fact are not generally constitutionally protected, but are in fact only sometimes protected.

Nevertheless, the majority stated, "we presumptively protect all speech, including false statements"[245] but as O'Scannlain pointed out, the Supreme Court declared, courts must only "protect *some falsehood* in order to protect *speech that matters*."[246] O'Scannlain, just as Bybee, also had a problem with the majority determining, although the Supreme Court previously used the language "false statements", the Court actually meant defamation and not a general category of "false statements."[247]

Just as Bybee did earlier, O'Scannlain disagreed with the majority that the Stolen Valor Act needed to require some specific harm.[248] Numerous laws punishing false statements, never found to be unconstitutional, require no showing of harm.[249] It would seem, according to the majority's decision, the constitutionality of all these laws could now easily be brought into question even though the Supreme Court has repeatedly found these statutes do not necessarily require a showing of harm.

The lack of an explicit scienter requirement in the Stolen Valor Act did not bother O'Scannlain.[250] He argued there was little chance the Stolen Valor Act would ever punish someone who truthfully did not know his or her statements about the false receipt of a medal was

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[244] *Id*. at 680. (quoting Johnson v. Multnomah Cnty., 48 F.3d 420, 424 (9th Cir.1995) (emphasis in original).
[245] Alvarez, 617 F.3d at 1217
[246] *Id*. at 681. (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, (1974) (emphasis added)).
[247] *Id*. at 682.
[248] *Id*. at 684.
[249] *Id*.
[250] *Id*. at 685.

false.[251] Therefore, a court should not strike down the Act merely because of the lack of a scienter requirement.

Even assuming *arguendo* the majority's harm requirement is correct, it is met.[252] The congressional findings illustrate the harm done when individuals lie about receiving military medals[253] and O'Scannlain noted the majority recognized it was a compelling governmental interest to prevent this harm.[254] Supreme Court precedent allows for assumptions such as the assumptions made in the congressional findings for the Stolen Valor Act to support a statute and relying on such assumptions is not a reason to find a statute unconstitutional.[255] Nothing the majority stated, either in the original case or the opinion given in the denial of the petition for rehearing, proved the harm identified by Congress was not a true harm other than perhaps a non-fact based disagreement over the amount of harm caused by the majority in the original case.

O'Scannlain finally attacked Kozinski's position that upholding the Stolen Valor Act as constitutional will lead to all white lies being criminalized.[256] O'Scannlain argued most of the statements Kozinski pointed out as white lies, which the majority worried might become punishable if it found the Act as constitutional, are not falsehoods at all.[257] It is not foreseeable the Stolen Valor Act will have anywhere near the far-reaching effect that the majority worried about. O'Scannlain thought the majority argued in terms of worst case scenario, coming up with

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[251] *Id*. "It is difficult to imagine a scenario in which a speaker honestly believes that he has been awarded a military honor that he has not actually received. To the extent that any such case would arise, it surely would be the rare exception."

[252] *Id*.

[253] *See* STOLEN VALOR ACT OF 2005, Pub. L. No. 109–437, 120 Stat 3266, §2 "Findings" (2006).

[254] United States v. Alvarez, 638 F.3d 666, 685 (9th Cir. 2011). In the previous case the majority stated "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." United States v. Alvarez, 617 F.3d 1198, 1216 (9th Cir. 2010).

[255] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61–62 (1973). The Supreme Court declared it was a long established tradition that legislatures and judges act on "various unprovable assumptions" and legislatures have relied on these assumptions previously to restrict rights without problem.

[256] United States v. Alvarez, 638 F.3d 666, 686 (9th Cir. 2011).

[257] *Id*. O'Scannlain stated the "white lies" Kozinski worried about being punished were merely "opinions . . . ; expressions of emotion or sensation . . . ; predictions or plans . . . '; exaggerations . . . ; and playful fancy."

some horrible future if the Act was found constitutional.[258] He stated, " [l]ike a Hollywood horror film, Chief Judge Kozinski describes a fictional world that may frighten, but which is far removed from the one in which we actually live."[259]

iv. Justice Gould's dissent

Justice Gould also dissented from the rehearing en banc, agreeing with the other dissenters that the majority's original decision was "in tension with Supreme Court holdings."[260] Gould took a different position in analysis however and stated, "the military context, in which the power of Congress is necessarily strong" combined with the absolute "lack of any societal utility in tolerating false statements of military valor . . . which steal or dilute significant honors bestowed on military heroes, counsel that it's improper to apply strict scrutiny to invalidate this law on its face."[261] Gould believed the government's interest in protecting the reputation of its military decorations was "a powerful one that a federal court should hesitate to diminish by outlawing the controlling statute on its face."[262]

Society received nothing beneficial from Alvarez's false statements nor for the most part did Alvarez and because of this Gould felt the court should have found the false statements made by Alvarez were "a 'carefully defined' subset of false factual statements not meriting constitutional protection."[263] This conclusion would have allowed the court to punish Alvarez and find the Stolen Valor Act constitutional while not holding that all false statements were without First Amendment protection.

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[258] *Id*. at 686–87.
[259] *Id*. at 687.
[260] *Id*.
[261] *Id*.
[262] *Id*.
[263] *Id*. at 688.

e. *Alvarez* Heading to the Supreme Court

The government appealed the decision. On October 17, 2011 the Supreme Court of the United States granted the government's petition for writ of certiorari and the oral argument was scheduled for February 22, 2012. [264] During the oral argument, it appeared the Supreme Court justices were still divided regarding the constitutionality of the Act.[265] It seemed many of the Justices agreed with the line of reasoning suggested by Bybee earlier; namely that First Amendment protection does not extend to the false statements punished by the Stolen Valor Act, especially when considering the harm Congress found the false statements caused.[266] However, Justice Kennedy seemed to worry, as other judges have, about the potential "slippery slope" which might result from the Supreme Court allowing the punishment of these false statements.[267] Nevertheless Justice Kennedy acknowledged, "[o]n the other hand, I have to acknowledge that this (lying) does diminish the medal in many respects."[268]

Justice Kagan argued that the government also has a strong interest in family stability and asked if the line of reasoning used in support of the Stolen Valor Act could be used to "prevent everybody from telling lies about their extramarital affairs." Solicitor General Verrilli was quick to note that that hypothetical was very different from the case at hand. Justice Scalia seemed to be an ardent advocate of upholding the law and seemed to agree with congress that the false statements about receiving military medals belittle the luster of those medals.[269] Comments throughout the oral argument seemed to points towards the Justices buying into Solicitor General

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[264] United States v. Alvarez, 132 S. Ct. 457 (2011).
[265] James Vicini, Supreme Court hears military medal lying case, Reuters, Feb. 22, 2012, http://www.reuters.com/article/2012/02/22/us-usa-military-medals-idUSTRE81L1VJ20120222.
[266] *Id.*
[267] *Id.*
[268] Tony Mauro, Justices may uphold Stolen Valor Act, Feb. 23, 2012, http://www.firstamendmentcenter.org/justices-may-uphold-stolen-valor-act.
[269] James Vicini, Supreme Court hears military medal lying case, Reuters, Feb. 22, 2012, http://www.reuters.com/article/2012/02/22/us-usa-military-medals-idUSTRE81L1VJ20120222.

Verrilli's argument that the government has a compelling interest in protecting the integrity of the military medals.[270] Justice Roberts noted people such as Alvarez do benefit from lying about the receipt of military medals, asking, "Doesn't it help a politician to have a Congressional Medal of Honor?"[271] The Supreme Court also seemed to discredit Alvarez's argument that the Stolen Valor Act could punish parody or satire, with Justice Ginsburg stating "[b]ut the government has said, 'that's not how we read the statute,' and the courts read statutes to avoid constitutional collision."[272] The ruling in the case to come down by the end of June.[273]

IV. The Stolen Valor Act of 2011

Following the constitutional challenges to the Stolen Valor Act of 2005 and its striking down in *Alvarez*, Congressman Joe Heck introduced a new version of the Act, the Stolen Valor Act of 2011, to the House of Representatives.[274] Subsequently, Senator Scott Brown introduced an identical version of the new Act in the Senate.[275] The updated version of the Stolen Valor Act focused on making it illegal for people to *benefit* from false factual statements about their military service. The proposed versions completely remove subsection (b) of the Stolen Valor Act of 2005, the section which contains the language "whoever falsely represents himself or herself . . . to have been awarded any decoration or medal" that courts seemed to have the most issues with.[276]

a. Textual Differences

[270] Tony Mauro, Justices may uphold Stolen Valor Act, Feb. 23, 2012, http://www.firstamendmentcenter.org/justices-may-uphold-stolen-valor-act.
[271] James Vicini, Supreme Court hears military medal lying case, Reuters, Feb. 22, 2012, http://www.reuters.com/article/2012/02/22/us-usa-military-medals-idUSTRE81L1VJ20120222.
[272] Tony Mauro, Justices may uphold Stolen Valor Act, Feb. 23, 2012, http://www.firstamendmentcenter.org/justices-may-uphold-stolen-valor-act.
[273] James Vicini, Supreme Court hears military medal lying case, Reuters, Feb. 22, 2012, http://www.reuters.com/article/2012/02/22/us-usa-military-medals-idUSTRE81L1VJ20120222.
[274] H.R. 1775, 112th Cong. (2011).
[275] S.1728, 112th Cong. (2011).
[276] *Compare* H.R. 1775, 112th Cong. (2011) and S.1728, 112th Cong. (2011), *with* 18 U.S.C. §704 (2006).

The Stolen Valor Act of 2011 seeks to only criminalize individuals who make false statements about their military service for their benefit. Specifically, the new Act seeks to punish "[w]hoever, with intent to obtain anything of value, knowingly makes a misrepresentation regarding his or her military service."[277] This definition of an offense under the newly proposed version of the Act includes both a "knowingly" scienter requirement and a requirement that the individual seek benefit from his or her lies, both noticeably absent from the Stolen Valor Act of 2005.

The Stolen Valor Act of 2011 also expands upon the Stolen Valor Act of 2005. For instance, the Stolen Valor Act of 2005 only punished false statements regarding the receipt of medals whereas the new Act includes misrepresenting military service in general.[278] Additionally, where the Stolen Valor Act of 2005 included enhanced punishment for making false statements about the receipt of certain medals, the new Act allows for enhanced punishment "if the misrepresentation is that such individual served in a combat zone, served in a special operations force, or was awarded the Congressional Medal of Honor."[279] The enhanced punishments for misrepresentation regarding serving in a combat zone and serving in a special operations force are new for the Stolen Valor Act of 2011 as well.[280]

Conversely, the new Act does not provide for enhanced penalties if the military decoration that is misrepresented is a Distinguished Service Cross, a Navy Cross, an Air Force Cross, a Silver Star or a Purple Heart as the Stolen Valor Act of 2005 does.[281] Under the new bills, any individual falsely representing to have received one of these military decoration would

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[277] H.R. 1775, 112th Cong. (2011)
[278] *Compare* 18 U.S.C. §704 (2006), *with* H.R. 1775, 112th Cong. (2011) and S.1728, 112th Cong. (2011).
[279] *Id*.
[280] *Id*.
[281] *Compare* H.R. 1775, 112th Cong. (2011) and S.1728, 112th Cong. (2011), *with* 18 U.S.C. §704 (2006).

fall under the blanket provision for all other violations of the Act and be fined and/or imprisoned for up to six months.[282]

Another interesting change in the new version of the Act is it specifically states an individual cannot be punished for misrepresenting he or she *did not* serve in the Armed Forces.[283] One of the more important safeguards included in the act is an included defense. The proposed bills, in subsection (c), state, "[i]t is a defense to a prosecution under this section if the thing of value is de minimis."[284] This section is likely included to make sure only cases where a false claim is made in order to gain a measurable benefit are prosecuted and petty instances of violation do not clog the courts.

b. Progress

The bill in the House was referred to the House Committee on the Judiciary's Subcommittee on Crime, Terrorism and Homeland security on June 1, 2011.[285] The version in the Senate was referred to the Senate Judiciary Committee on October 18, 2011.[286] The bills are currently still in the respective committees[287], which are perhaps waiting on the Supreme Court decision in *Alvarez*, but Heck stated, "I'm confident this approach will pass constitutional review and protect the individuals who have sacrificed to protect our freedom."[288]

V. Conclusion

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[282] H.R. 1775, 112th Cong. (2011) and S.1728, 112th Cong. (2011).
[283] *Id*.
[284] *Id*.
[285] "Bill Summary & Status 112th Congress (2011–2012) H.R.1775". Available from: *Thomas* (Library of Congress), http://Thomas.loc.gov; Accessed: 2/8/12
[286] "Bill Summary & Status 112th Congress (2011–2012) S.1728". Available from: *Thomas* (Library of Congress), http://Thomas.loc.gov; Accessed: 2/8/12
[287] "Bill Summary & Status 112th Congress (2011–2012) H.R.1775". Available from: *Thomas* (Library of Congress), http://Thomas.loc.gov; Accessed: 2/8/12 and "Bill Summary & Status 112th Congress (2011–2012) S.1728". Available from: *Thomas* (Library of Congress), http://Thomas.loc.gov; Accessed: 2/8/12
As of February 7th, 2012 both of the bills were in their respective committees according to the Thomas database, provided by the Library of Congress, and no further action had been taken.
[288] *Heck Introduces the Stolen Valor Act of 2011*, WEBSITE OF CONGRESSMAN HECK (May 5, 2011), http://heck.house.gov/press-release/heck-introduces-stolen-valor-act-2011.

Throughout the legislative history of the Stolen Valor Act and its trials and tribulations in courts across the United States, one aspect of the Act was rarely brought into question: the protection of the reputation of military decorations is of great importance. However, courts are split as to how far Congress can reach in order to try to protect this reputation. With courts differing widely on their decisions regarding the historical status of false statements of fact, as well as the overall constitutionality of the Stolen Valor Act, and many cases getting overturned, the Supreme Court will soon provide final answers to these questions. But even if the Act is struck down, all hope is not lost for supporters as a new, perhaps less controversial, version is making its way through Congress and this bill seeks to punish not only false statements about medals but also false statements about military service in general.