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Resolving the Conflict Between the Stolen Valor Act of 2005 and the First Amendment

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NOTES

Resolving the Conflict Between the Stolen Valor Act of 2005 and the First Amendment

INTRODUCTION

In May 2010, the *New York Times* unveiled a series of misstatements regarding the military career of Connecticut's Democratic Senate candidate, Richard Blumenthal.¹ As early as 2000, Mr. Blumenthal was believed to be a Vietnam War veteran.² Not only did he expressly state, "I served in Vietnam," but he also described the anguish he suffered as a result of the criticism and cynicism he and his "fellow" veterans endured when they came home.³ Although he made these misstatements for years, Mr. Blumenthal never served overseas.⁴ From 1965 through 1970, Mr. Blumenthal reportedly received five draft deferments; three were educational deferments and two were occupational.⁵ Once Mr. Blumenthal exhausted his potential deferments and drew a very low number in the draft lottery, he secured a position with the Marine Corps Reserve and avoided the battlefield.⁶ Although Mr. Blumenthal took "full responsibility" for these false claims once they were uncovered,

¹ David M. Halbfinger & James Barron, *Campaign in Damage Control Over 'a Few Misplaced Words,'* N.Y. TIMES, May 19, 2010, at A3, available at <http://www.nytimes.com/2010/05/19/nyregion/19reax.html?ref=nyregion>; Raymond Hernandez, *Candidate's Words on Vietnam Service Differ from History,* N.Y. TIMES, May 18, 2010, at A1, available at <http://www.nytimes.com/2010/05/18/nyregion/18blumenthal.html>.

² Hernandez, *supra* note 1, at A1.

³ *Id.*

⁴ *Id.*; Halbfinger & Barron, *supra* note 1, at A3.

⁵ Occupational deferments were very rare, especially after President Lyndon B. Johnson's administration drastically reduced graduate school deferments in 1968. Hernandez, *supra* note 1, at A1.

⁶ *Id.*

he emphasized that he simply “misspoke” and did not intentionally lie to the American public.⁷

Shortly thereafter, the *Washington Post* began investigating the military history of Illinois Republican Senate candidate Mark Kirk.⁸ In his official biography and during a speech at a House committee hearing in March 2002, Mr. Kirk claimed that he was once the Navy’s Intelligence Officer of the Year.⁹ Aware that the *Post* investigation would disclose the inaccuracy of that statement and mindful of the Blumenthal debacle, Mr. Kirk acted.¹⁰ During the week of the media frenzy surrounding Blumenthal, Mr. Kirk blogged about the misrepresentation he had made in his biography.¹¹ In actuality, the National Military Intelligence Association, a professional organization, gave the award to not just him, but his entire service unit, which had been based in Aviano, Italy, in 2000.¹² Mr. Kirk had also embellished his military career by claiming that he “served in the Gulf War,” “commanded the Pentagon war room,” and flew “intelligence missions over Iraq” while “under fire.”¹³ Though Mr. Kirk was in fact a member of the Navy Reserve beginning in 1989, these stories are simply not a part of his service record.¹⁴ Like Mr. Blumenthal, Mr. Kirk came clean in the beginning of June and apologized for his misstatements.¹⁵ Despite lying about their military valor, both Mr. Blumenthal and Mr. Kirk were elected to the United States Senate in November 2010.¹⁶

⁷ Halbfinger & Barron, *supra* note 1, at A3.

⁸ R. Jeffrey Smith, *Illinois Republican Senator Candidate Admits to Error on Navy Award*, WASH. POST, May 30, 2010, at A03, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/29/AR2010052903510.html>.

⁹ *Id.*

¹⁰ Todd Lighty et al., *Kirk Apologizes for Misstatements About Military Career*, CHI. TRIB., June 30, 2010, available at http://articles.chicagotribune.com/2010-06-03/news/ct-mark-kirk-military-record-060420100603_1_military-gulf-war-democratic-senate.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*; Smith, *supra* note 8.

¹⁵ Lighty, *supra* note 10. In a meeting with *The Chicago Tribune*, Kirk admitted that portions of his résumé regarding his military experience were embellishments and not as precise as they should be. He apologized for the “misstatements” and repeatedly indicated that they were “mistakes” due to an effort to translate technical terms to the voters and the carelessness of his campaign staff. *Id.*

¹⁶ Susan Haigh, *Richard Blumenthal Defeats Linda McMahon in Connecticut Senate Race*, HUFFINGTON POST (Nov. 2, 2010), http://www.huffingtonpost.com/2010/11/02/richard-blumenthal-defeats-lindamcmahon_n_765868.html?view=screen; Todd Lighty & Bob Sexter, *Kirk Captures Senate Seat*, CHI. TRIB., Nov. 3, 2010, available at <http://www.chicagotribune.com/news/elections/ct-elect-senate-20101103,0,1866246,full.story>.

In addition to public officials, private citizens are lying about their military valor as well.¹⁷ In many instances, individuals have gone further than Blumenthal or Kirk, claiming to have received some of the most noteworthy and honorable military awards, such as the Congressional Medal of Honor and the Purple Heart.¹⁸

In light of a substantial increase in this behavior,¹⁹ Congress enacted the Stolen Valor Act of 2005.²⁰ The Act criminalizes the unauthorized wearing, selling, manufacturing, and distributing of military awards and decorations, as well as false representations regarding receipt of the awards made in written or spoken word.²¹

Despite this congressional effort, courts have not consistently upheld the Act under the First Amendment. Section 704(b) of the Act is particularly problematic; it criminalizes false representations made “verbally or in writing.”²² Both the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for the District of Colorado have held that section 704(b) is a facially invalid, content-based

¹⁷ For example, an individual, Andrew Alexander Diabo, claimed to be “a wounded Marine helicopter pilot” in Afghanistan and Iraq and a West Point Cadet. He supported his untruths with a West Point uniform hanging in his closet and military medals such as a Purple Heart and Silver Star framed and hanging on the walls of his home. He used these lies about his military history to defraud numerous people, accumulating over a half million dollars in debt to these individuals. After the Marine Corps Inspector General’s Office in Washington warned Diabo to stop, Diabo disappeared before any federal officials could properly charge him with any crimes. Larry King, *How a Local ‘War Hero’ Went AWOL*, PHILA. INQUIRER, Apr. 25, 2010, at A01; see also *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1185 (D. Colo. 2010) (order granting defendant’s motion to dismiss information) (The defendant, Rick Glen Strandlof, was charged for falsely claiming to have received a Purple Heart on four separate occasions and a Silver Star on another occasion.); *United States v. McGuinn*, No. 07 Cr. 471(KNF), 2007 WL 3050502, at *1-5 (S.D.N.Y. Oct. 18, 2007) (memorandum and order) (The defendant, Louis Lowell McGuinn, after being discharged from the Army as a private, claimed that he was a lieutenant colonel and actually wore military medals such as the Silver Cross, Purple Heart, and Silver Star without ever having received the medals for his service. The state charged him under the Stolen Valor Act.); Christian Davenport, *One Man’s Database Helps Uncover Cases of Falsified Valor*, WASH. POST, May 10, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/09/AR20100509033.63.html> (“The FBI investigated 200 stolen valor cases . . . and typically receives about 50 tips a month, triple the number that came in before the September 2001 terrorist attacks.”).

¹⁸ See sources cited *supra* note 17.

¹⁹ Davenport, *supra* note 17.

²⁰ Stolen Valor Act of 2005, 18 U.S.C. § 704 (2006).

²¹ *Id.*

²² *United States v. Alvarez*, 617 F.3d 1198, 1217 (9th Cir. 2010) (holding the Stolen Valor Act of 2005 facially invalid under the First Amendment), *cert. granted*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210); see also *Strandlof*, 746 F. Supp. 2d at 1192 (granting defendant’s motion to dismiss information because the Stolen Valor Act is unconstitutional under the First Amendment).

restriction under the First Amendment.²³ In *United States v. Alvarez*, the Ninth Circuit concentrated on the question of whether “false statements of fact,” targeted by section 704(b), are protected by the First Amendment.²⁴ The majority held that false statements are protected and, therefore, cannot be the predicate of criminal sanction unless the Act passes strict scrutiny.²⁵ As a result of this conclusion, the court struck down section 704(b) because less restrictive alternative means were available to Congress.²⁶ Similarly, in *United States v. Strandlof*, the District Court of Colorado found that the Act failed strict scrutiny.²⁷ According to the court, the government failed to provide a compelling government interest in support of the Act.²⁸

By contrast, the U.S. District Court for the Western District of Virginia found section 704(b) constitutional in *United States v. Robbins*.²⁹ Directly conflicting with the Ninth Circuit, the court held that false statements of fact are not protected by the First Amendment.³⁰ As a result of this finding, the Western District of Virginia did not apply strict scrutiny, but rather upheld the Act’s constitutionality under the overbreadth doctrine.³¹

Overall, the constitutionality of section 704(b) has been inconsistently rejected among the lower courts.³² In response to the uncertainty presented by these courts’ decisions, on October, 17, 2011, the Supreme Court granted certiorari in

²³ See, e.g., *Alvarez*, 617 F.3d at 1217; *Strandlof*, 746 F. Supp. 2d at 1192. Under First Amendment jurisprudence, if the statute at issue is a content-based restriction on protected speech it is subject to the strict scrutiny test, see, e.g., *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010); *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Gooding v. Wilson*, 405 U.S. 518, 522 (1972), which requires that the government show that the statute is “narrowly tailored to serve a compelling government interest.” *Boos v. Barry*, 485 U.S. 312, 321 (1988). By contrast, if the statute is a content-based restriction on a type of speech within a traditionally unprotected category, then it is not subject to strict scrutiny, but rather to less stringent analyses, such as the overbreadth and void-for-vagueness doctrines. See, e.g., *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-504 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *Grayned v. City of Rockford*, 408 U.S. 104, 108-22 (1972). For a more detailed analysis of the overbreadth and void-for-vagueness doctrines, see *infra* Part II.C.

²⁴ *Alvarez*, 617 F.3d at 1201-17.

²⁵ *Id.* at 1217.

²⁶ *Id.* at 1216-17.

²⁷ *Strandlof*, 746 F. Supp. 2d at 1192.

²⁸ *Id.* at 1189.

²⁹ 759 F. Supp. 2d 815, 821 (W.D. Va. 2011).

³⁰ *Id.* at 817.

³¹ *Id.* at 818-19. See Part II.C.1 for a discussion of the overbreadth doctrine.

³² Compare *United States v. Alvarez*, 617 F.3d 1198, 1217 (9th Cir. 2010), cert. granted, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210), and *Strandlof*, 746 F. Supp. 2d at 1192, with *Robbins*, 759 F. Supp. 2d at 821.

United States v. Alvarez to determine whether the statute is facially invalid under the First Amendment.³³

Before certiorari was granted, Congress sought to uphold the initiative of the Stolen Valor Act of 2005 and proposed a new statute entitled the Stolen Valor Act of 2011.³⁴ The bill seeks to eliminate subsection (b) of 18 U.S.C. § 704 and remedy the section's flaws.³⁵ The bill also expands the reach of section 704(b) by criminalizing misrepresentations about one's "military service," rather than just misrepresentations about the receipt of a military award or decoration.³⁶

This note examines section 704(b) of the Stolen Valor Act of 2005 and the proposed Stolen Valor Act of 2011 under the First Amendment. It argues that both Acts are unconstitutional. Part I recounts the history of protecting military valor in America leading up to the enactment of the Stolen Valor Act of 2005 and the introduction of the 2011 bill. Part II argues for section 704(b)'s unconstitutionality under First Amendment jurisprudence, and Part III discusses the unconstitutionality of the Stolen Valor Act of 2011. Additionally, this note suggests further change to the Stolen Valor Act of 2005 and calls upon state and local legislatures, in Part IV, to supplement these federal remedies. Specifically, Part IV suggests that Congress should restructure the Stolen Valor Act of 2005 to resemble a fraud statute. And furthermore, state and local legislatures, to hold public officials accountable, should impose an eligibility requirement prohibiting false claims of military valor and service by individuals seeking an elected position.

I. PROTECTING MILITARY VALOR AND THE STOLEN VALOR ACT OF 2005

Valor is defined as the "strength of mind or spirit that enables a person to encounter danger with firmness."³⁷ Derived from Middle English, Anglo-French, and Medieval Latin, *valor* has historically become synonymous with strength, worthiness, and

³³ *United States v. Alvarez*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210).

³⁴ See Stolen Valor Act of 2011, H.R. 1775, 112th Cong. § 1 (2011); see also *Alvarez*, 617 F.3d at 1217 (9th Cir. 2010); *Strandlof*, 746 F. Supp. 2d at 1192; *Robbins*, 759 F. Supp. 2d at 821.

³⁵ See H.R. 1775 § 2.

³⁶ Compare *id.*, with Stolen Valor Act of 2005, 18 U.S.C. § 704(b) (2006).

³⁷ *Valor Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/valor> (last visited Aug. 8, 2011).

bravery.³⁸ Moreover, *valor* has traditionally been used to characterize the distinguished bravery of members of the military.³⁹

In an effort to encourage, honor, and recognize military valor, numerous military awards and decorations have been created and awarded.⁴⁰ Honoring members of the military is a tradition in the United States that dates back to the 1780s, when George Washington was President.⁴¹ As a former general, President Washington identified with a “desir[e] to cherish [the] virtuous ambition in his soldiers” exemplified through “instances of unusual gallantry . . . extraordinary fidelity, and essential service.”⁴² In 1782, President Washington created “honorary badges of distinction” to carry out his objective to “meet [valor] with [] due reward.”⁴³ Included in these honorary badges was the predecessor to one of today’s most admirable military awards—the Purple Heart.⁴⁴ While introducing these badges and describing their purposes and importance, Washington also strongly

³⁸ *Id.*

³⁹ *See, e.g., id.* (As an example of the use of the word *valor*, the site uses, “The soldiers received the nation’s highest award for valor.”).

⁴⁰ *See, e.g.,* Medal of Honor, 10 U.S.C. § 3741 (2006) (awarded to a member of the Army who “distinguished himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty”); Distinguished-Service Cross, *id.* § 3742 (awarded to a member of the Army who “distinguishes himself by extraordinary heroism not justifying the award of a medal of honor”); Distinguished-Service Medal, *id.* § 3743 (awarded to a member of the Army who “distinguishes himself by exceptionally meritorious service to the United States in a duty of great responsibility”); Silver Star, *id.* § 3746 (awarded to a member of the Army who “is cited for gallantry in action that does not warrant a medal of honor or distinguished-service cross”); Distinguished Flying Cross, *id.* § 3749 (awarded to a member of the Army who “distinguishes himself by heroism or extraordinary achievement while participating in an aerial flight”); Soldier’s Medal, *id.* § 3750 (awarded to a member of the Army who “distinguishes himself by heroism not involving actual conflict with an enemy”); Civil War Battle Streamers, *id.* § 3753 (authorizes the wearing of these streamers to units and regiments in the Army entitled by the Secretary of the Army); Korea Defense Service Medal, *id.* § 3756 (awarded to qualifying members of the Army who served in the Republic of Korea or adjacent waters during the conflict in Korea); Purple Heart, *id.* § 1129 (awarded to a member of the armed forces “who is killed or wounded in action as the result of an act of an enemy of the United States”); *see also* Purple Heart, *id.* § 1131.

⁴¹ GENERAL ORDERS OF GEORGE WASHINGTON ISSUED AT NEWBURGH ON THE HUDSON, 1782-1783, at 30-31 (Edward C. Boynton, ed., Newburgh, N.Y., E.M. Rutenber & Son 1883) (Order of Aug. 7, 1782).

⁴² *Id.* at 30.

⁴³ *Id.*

⁴⁴ *Id.* at 30-31; *see also* 10 U.S.C. § 1129 (describing the Purple Heart as an award given to soldiers who have been “killed or wounded in action as the result of an act of the enemy of the United States”); *Purple Heart*, INSTITUTE OF HERALDRY, http://www.tioh.hqda.pentagon.mil/Awards/purple_heart.aspx (last visited Sept. 3, 2011) (describing the background, criteria and components of the Purple Heart). For a list of United States military ribbons by superiority, *see Ribbons—Order of Precedence*, INSTITUTE OF HERALDRY, http://www.tioh.hqda.pentagon.mil/Awards/order_of_precedence.aspx (last visited Sept. 3, 2011).

asserted that individuals who falsely represented themselves as recipients of the awards should “be severely punished.”⁴⁵

As the passage of the Stolen Valor Act of 2005 demonstrates, Washington was not the only government official who sought to protect the reputation of the nation’s military awards.⁴⁶ Originally, the Stolen Valor Act only criminalized the unauthorized wearing, manufacturing, or selling of military awards and decorations.⁴⁷ In late 2005, however, Congress introduced an amendment to 18 U.S.C. § 704 that enhanced the section’s protection.⁴⁸ The amendment allows the prosecution of those who falsely claim receipt of military awards.⁴⁹ The proposed amendment’s sponsor, former U.S. Congressman John Salazar, was inspired by the college thesis of a constituent, Pamela Sterner. In the thesis, Mrs. Sterner advocated for a criminal statute to police false claims of military valor.⁵⁰ Upon

⁴⁵ GENERAL ORDERS OF GEORGE WASHINGTON, *supra* note 41, at 30-31.

⁴⁶ See Stolen Valor Act of 2005, 18 U.S.C. § 704 (2006); Stolen Valor Act of 2005, Pub. L. No. 109-437, § 3, 120 Stat. 3266.

⁴⁷ Stolen Valor Act, 18 U.S.C. § 704 (1994), *amended by* 18 U.S.C. § 704 (2006) (“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 under this title or imprisoned not more than six months, or both.”).

⁴⁸ See Statements on Introduced Bills and Joint Resolutions, 151 CONG. REC. S12,684, S12,688 (Nov. 10, 2005) (statement of Sen. Kent Conrad) (“Recipients of the Medal of Honor, Distinguished Service Awards, Silver Star, or Purple Heart have made incredible sacrifices for our country. They deserve our thanks and respect. Unfortunately, however, there are some individuals who diminish the accomplishments of award recipients by using medals they have not earned. These 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. Currently, Federal law enforcement officials are only able to prosecute those who wear counterfeit medals. . . . My legislation will allow law enforcement officials to prosecute those who falsely claim, either verbally or in writing, to be medal recipients.”).

⁴⁹ See *id.*

⁵⁰ See Clay Calvert & Rebekah Rich, *Low-Value Expression, Offensive Speech, and the Qualified First Amendment Right to Lie: From Crush Videos to Fabrications About Military Medals*, 42 U. TOL. L. REV. 1, 15-16 (2010) (citing Tom Gottlieb, *An Act for Valor Student’s Legislative Quest Ends with Congressional Approval*, ROLL CALL, Dec. 11, 2006; Pamela M. Sterner, *The Stolen Valor Act of 2005: Medal of Honor Legislative Changes-Title 18 (U.S.C.)* (rev. July 13, 2005) (unpublished term paper, Colorado State University-Pueblo), available at <http://www.homeofheroes.com/herobill/legislation.pdf>). Pamela Sterner has worked with her husband Doug, a Vietnam veteran, to lobby for better recognition of Congressional Medal of Honor recipients and the exposure of imposters. For example, the Sterners successfully lobbied for the enactment of legislation authorizing special license plates for recipients. Doug also created a website, entitled “Home of Heroes” where he posted a database with the names of over 120,000 actual recipients of military awards. Doug Sterner & Pam Sterner, *Preserving the History of Recipients of the Medal of Honor*, HOME OF HEROES, <http://www.homeofheroes.com> (last visited June 17, 2011); Davenport, *supra* note 17.

receipt of Mrs. Sterner's submission, Mr. Salazar, a Vietnam veteran, sought to carry out her request.⁵¹

This objective was accomplished by enacting 18 U.S.C. § 704(b), which states,

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.⁵²

Additionally, while the original Act only included an enhanced punishment for unauthorized use of a Congressional Medal of Honor,⁵³ the amended Act includes enhanced punishment for misrepresentations regarding a Navy cross, an Air Force cross, a Silver Star, or a Purple Heart.⁵⁴ Instead of a fine and/or incarceration for up to six months, a misdemeanor of this type is punishable by a fine and/or incarceration for up to one year.⁵⁵

Within a short time, the bill had 111 cosponsors in the House of Representatives and twenty-seven cosponsors in the Senate.⁵⁶ On December 20, 2006, the amendments were enacted

Currently, military records are not up to par to aid in these investigations so much so that private individuals, such as Mr. Sterner, have taken it upon themselves to investigate and unveil these imposters. *See id.* Congress is, however, attempting to pass a bill to produce a public online database listing recipients of awards and all individuals who have served in the armed forces. *See* Military Valor Roll of Honor Act, H.R. 666, 111th Cong. § 1136 (2009).

⁵¹ *See* Calvert & Rich, *supra* note 50, at 16 (citing *About John, SALAZAR FOR CONGRESS*, <http://www.salazarforcongress.com/about/bio> (last visited Jan. 28, 2011)).

⁵² Stolen Valor Act of 2005, 18 U.S.C. § 704(b) (2006).

⁵³ Stolen Valor Act, 18 U.S.C. § 704(b) (1994), *amended by* 18 U.S.C. § 704(c) (2006) ("If a decoration or medal involved in an offense under subsection (a) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both."); *see also id.* (defining a "Congressional Medal of Honor" as a medal awarded under 10 U.S.C. § 3741 (1994), 10 U.S.C. § 6241 (1994), or 10 U.S.C. § 8741 (1994)).

⁵⁴ Stolen Valor Act of 2005, 18 U.S.C. § 704(d) (2006) ("If a decoration or medal involved in an offense described in subsection (a) or (b) is a distinguished-service cross awarded under section 3742 of title 10, a Navy cross awarded under section 6242 of title 10, an Air Force cross awarded under section 8742 of section 10, a silver star awarded under section 3746, 6244, or 8746 of title 10, a Purple Heart awarded under section 1129 of title 10, or any replacement or duplicate medal for such medal as authorized by law, in lieu of the punishment provided in the applicable subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.")

⁵⁵ *Compare* 18 U.S.C. § 704(a), *and* § 704(b), *with* § 704(c), *and* § 704(d).

⁵⁶ The Library of Congress, *Bill Summary & Status 109th Congress (2005-2006) H.R. 3352 Cosponsors*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR03352:@@P> (last visited Sept. 22, 2011); The Library of Congress, *Bill Summary & Status 109th Congress (2005-2006) S. 1998 Cosponsors*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN01998:@@P> (last visited Sept. 22, 2011).

into law and received widespread support.⁵⁷ In fact, the Senate unanimously voted in favor of the Act.⁵⁸

Two states, using the Stolen Valor Act of 2005 as a model, adopted similar legislation shortly thereafter. Utah adopted the exact language of 18 U.S.C. § 704(b).⁵⁹ Similarly, California enacted a statute criminalizing misrepresentations about one's military history if the misrepresentations were made with the intent to defraud.⁶⁰ California's legislature also enacted a separate provision requiring public officials of the state to resign if they are convicted under the federal Stolen Valor Act of 2005.⁶¹

Despite broad support in Congress, some courts have held the Act unconstitutional. As a result, Congress has already begun to revise it.⁶² On May 5, 2011, the House of Representatives introduced HR 1775, which repeals section 704(b) and creates an entirely new statute entitled the Stolen Valor Act of 2011.⁶³

⁵⁷ Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266 (2006); *see also* 151 CONG. REC. S9215-9216, S9215 (Sept. 7, 2006) (statement of Sen. Bill Frist), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2006_record&page=S9215&position=all (explicating a unanimous Senate vote for the bill).

⁵⁸ 151 CONG. REC. S9215-9216, S9215 (Sept. 7, 2006) (statement of Sen. Bill Frist), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2006_record&page=S9215&position=all (explicating a unanimous Senate vote for the bill).

⁵⁹ UTAH CODE ANN. § 76-9-706 (West 2010). Utilizing similar language to that of the federal Stolen Valor Act of 2005, 18 U.S.C. § 704 (2006), UTAH CODE ANN. § 76-9-706 states in part:

(2) Any person who intentionally makes a false representation, verbally or in writing, that the person has been awarded a service medal is guilty of a class C misdemeanor.

(3) Any person who wears, purchases, attempts to purchase, solicits for purchase, mails, ships, imports, exports, produces blank certificates of receipt for, manufactures, sells, attempts to sell, advertises for sale, trades, barter, or exchanges for anything of value a service medal, or any colorable imitation thereof, except when authorized by federal law, or under regulations made pursuant to federal law, with the intent to defraud, or with the intent to falsely represent that the person or another person has been awarded a service medal, is guilty of a class C misdemeanor.

⁶⁰ CAL. PENAL CODE § 532b(c)(1) (West 2011) states, "any person who, orally, in writing, or by wearing any military decoration, falsely represents himself or herself to have been awarded any military decoration, with the intent to defraud, is guilty of a misdemeanor." While this statute is similar to the federal criminal sanction, the federal version does not require an intent to defraud. *See supra* notes 52-54 for the language of the federal statute. The absence of such language was a problem addressed by the Ninth Circuit. *See United States v. Alvarez*, 617 F.3d 1198, 1212 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210).

⁶¹ CAL. GOV'T. CODE § 3003 (West 2010) ("An elected officer of the state or a city, county, city and county, or district in this state forfeits his or her office upon the conviction of a crime pursuant to the federal Stolen Valor Act of 2005 . . .").

⁶² Stolen Valor Act of 2011, H.R. 1775, 112th Cong. § 2 (2011).

⁶³ *Id.* §§ 1-2.

The proposed statute provides,

Whoever, with intent to obtain anything of value, knowingly makes a misrepresentation regarding his or her military service, shall—(1) 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, be fined under this title, imprisoned not more than 1 year, or both; and (2) in any other case, be fined under this title, imprisoned not more than 6 months, or both.⁶⁴

The proposed legislation provides an exception to prosecution if an individual falsely denies military service.⁶⁵ Furthermore, the statute creates a defense “if the thing of value is *de minimis*”⁶⁶ and criminalizes not just false statements about the receipt of military awards but also misrepresentations about one’s military service in general.⁶⁷ The bill defines *military service* as follows:

- (A) service in the Armed forces of the United States;
- (B) service in a combat zone as a member of the Armed Forces of the United States;
- (C) attainment of a specific rank in the Armed Forces of the United States; and
- (D) receipt of—
 - (i) any decoration or medal authorized by Congress for the Armed Forces of the United States;
 - (ii) any of the service medals or badges awarded to members of such forces; or
 - (iii) the ribbon, button, or rosette of any such badge, decoration, or medal.⁶⁸

Due to this change in statutory language, the reach of the proposed legislation differs from section 704(b) of the Stolen Valor Act of 2005.⁶⁹ For example, expansion of the crime as proposed would enable law enforcement to reach individuals like Blumenthal, who may not have the audacity to claim

⁶⁴ *Id.* § 2.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Compare *id.*, with Stolen Valor Act of 2005, 18 U.S.C. § 704 (2006).

falsely that they received a Congressional Medal of Honor,⁷⁰ but who falsely claim to have *served*, for example, in Vietnam.⁷¹ Further, instead of generally criminalizing misrepresentations regarding the receipt of military awards “verbally or in writing,” the proposed bill criminalizes conduct with mens rea components of knowledge and “intent to obtain anything of value.”⁷² The absence of a mens rea element in the Stolen Valor Act of 2005 was one of the main concerns of the courts that found it facially invalid under the First Amendment.⁷³ Interestingly, the 2011 bill does not provide a harm element either, which the Ninth Circuit and District of Colorado both suggested would be necessary for the Act to be constitutional.⁷⁴

II. APPLICATION OF FIRST AMENDMENT JURISPRUDENCE TO THE STOLEN VALOR ACT OF 2005

The Stolen Valor Act of 2005 has been analyzed under a variety of tests pursuant to First Amendment case law, which has contributed to inconsistent decisions as to the constitutionality of the Act.⁷⁵ In anticipation of the Supreme Court’s review of the Act’s constitutionality,⁷⁶ this section first demonstrates that the Act regulates protected speech based on its content. Then, this section explicates each of the applicable tests under the First Amendment and applies them to section 704(b). Ultimately, the Act is unconstitutional because it runs afoul of each of these tests and the Supreme Court should strike it down.

⁷⁰ Xavier Alvarez claimed that he had received the Congressional Medal of Honor. *United States v. Alvarez*, 617 F.3d 1198, 1199 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210).

⁷¹ Senate candidate Richard Blumenthal claims he misspoke about serving in Vietnam as opposed to in the Military Reserves. Hernandez, *supra* note 1, at A1. Any service in the military is noteworthy. But when a person claims he served in one (usually higher-ranking) capacity when he actually served in another, it is difficult to fathom that such a misrepresentation would be made unknowingly or unintentionally—unless the serviceman truly “misspoke” and later corrected himself. As a note, courts should not determine which service outweighs another; rather, courts should use the system the military has already established. For the Institute of Heraldry’s order of precedence for military ribbons, see INSTITUTE OF HERALDRY, *supra* note 44.

⁷² Stolen Valor Act of 2011, H.R. 1775, 112th Cong. § 2 (2011).

⁷³ *Alvarez*, 617 F.3d at 1212; *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1188 (D. Colo. 2010) (order granting defendant’s motion to dismiss information).

⁷⁴ *Alvarez*, 617 F.3d at 1216; *Strandlof*, 746 F. Supp. 2d at 1188.

⁷⁵ Compare *Alvarez*, 617 F.3d at 1217, and *Strandlof*, 746 F. Supp. 2d at 1187-92, with *United States v. Robbins*, 759 F. Supp. 2d 815, 821 (W.D. Va. 2011).

⁷⁶ *United States v. Alvarez*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210).

A. *The Stolen Valor Act of 2005 & False Statements of Fact: An Unconstitutional Restriction on Protected Speech*

A constitutional analysis of the Stolen Valor Act of 2005 must begin with a threshold determination of whether the First Amendment protects the speech the Act seeks to regulate. In *United States v. Stevens*, the Supreme Court reaffirmed a list of categories of speech that the First Amendment does not protect: “obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.”⁷⁷ Even though the Court acknowledged that this list is not exhaustive,⁷⁸ the Court is generally reluctant to create a new category because it does not want to broaden the reach of the government over public discourse.⁷⁹ Thus, in determining whether the speech at issue in a government regulation should be afforded an exception to First Amendment protection, the Court first tries to fit the speech into one of the existing categories.⁸⁰ If there is no recognized classification, then the Court requires the government to proffer evidence that the speech has not traditionally been protected by the First Amendment—and therefore should not be protected today.⁸¹

The Stolen Valor Act concerns “false statement[s] of fact,” or lies.⁸² Surely “there is no unbridled constitutional right to lie.”⁸³ But mere lies do not fall under the list of traditionally unprotected categories,⁸⁴ nor are they worthy of a newly recognized one. Therefore, the Stolen Valor Act of 2005 regulates protected speech and is not presumptively constitutional under this analysis.

1. Failing to Fit Within Unprotected Categories of Speech

False statements of fact are most closely related to defamation and fraud, but are insufficiently identifiable with either to constitute unprotected speech.⁸⁵

⁷⁷ *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (citations omitted).

⁷⁸ *Id.* at 1586.

⁷⁹ *See id.* at 1585.

⁸⁰ *See id.* at 1584.

⁸¹ *See id.* at 1585.

⁸² *See* Stolen Valor Act of 2005, 18 U.S.C. § 704(b) (2006); *United States v. Alvarez*, 617 F.3d 1198, 1206 (9th Cir. 2010) (analyzing the type of speech at issue as a “false statement of fact”), *cert. granted*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210).

⁸³ *Id.* at 1205.

⁸⁴ *See Stevens*, 130 S. Ct. at 1585-86.

⁸⁵ *See id.* at 1584 (listing unprotected categories). The Act’s false statements of fact would not fall under Stevens’ remaining three categories. To be obscene, the

Defamatory speech must inflict harm to another's reputation.⁸⁶ If the statements concern a "matter of public concern" or a public official,⁸⁷ the plaintiff must show that the statements were made with "actual malice."⁸⁸ Even though false statements can be defamatory, the Stolen Valor Act does not require that false statements be made with a specific intent or a resulting harm.⁸⁹ Additionally, despite the Act's regulation of speech that would, in effect, "defame" the military, the speech does not constitute defamation because the military is a government agency, not an individual. Therefore, false statements of fact under the Act do not fall within the category of defamation.

The fraud category is equally inapplicable. The prosecution in a case of fraud must prove a bona fide harm; fraudulent statements or conduct must "induce another to act to his or her detriment."⁹⁰ As indicated, prosecution under the Stolen Valor Act of 2005 requires no evidence of harm.

Even when comparing the Act to other types of fraud statutes, it still does not fit neatly. For example, 18 U.S.C. § 912, which criminalizes the impersonation of government employees or officers,⁹¹ attaches when the individual "perform[s] . . . acts under the guise of [the] assumed identity"⁹²

speech would have to do with sexuality or sexual desire. *Miller v. California*, 413 U.S. 15, 24 (1973) (In determining whether a work is obscene, "the trier of fact must [ask] (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.") To constitute incitement, the speech would have to "persuad[e] another person to commit a crime." BLACK'S LAW DICTIONARY 347 (3d pocket ed. 2006). To amount to speech integral to criminal conduct, the speech must be "intrinsically related" to a crime. *See New York v. Ferber*, 458 U.S. 747, 761-62 (1982).

⁸⁶ BLACK'S LAW DICTIONARY 188 (3d pocket ed. 2006).

⁸⁷ *Id.*

⁸⁸ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964).

⁸⁹ *See Stolen Valor Act of 2005*, 18 U.S.C. § 704(b) (2006). While it can be argued that injury to the public may be implied if the speaker is a public official, the Stolen Valor Act does not specifically address public officials. For a more detailed analysis of the harms resulting from false statements made by public officials, see *infra* Part IV.B.

⁹⁰ BLACK'S LAW DICTIONARY 300 (3d pocket ed. 2006).

⁹¹ 18 U.S.C. § 912 ("Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.")

⁹² *United States v. Harmon*, 496 F.2d 20, 20-21 (2d Cir. 1974) (the court dismissed an indictment under 18 U.S.C. § 912 (1970), using the same "and acts as such" language as the current version 18 U.S.C. § 912 (2006), because it did not allege that defendant performed any "acts").

in an effort to obtain a benefit to which he is not entitled.⁹³ The Stolen Valor Act of 2005 does not require any specific acts in furtherance of any motive; it requires the mere utterance of words. Additionally, the Act is not comparable to perjury, requiring a “willful” false statement made under oath, or even criminally fraudulent administrative filings, requiring: (1) scienter and (2) the objective to interfere with the proper functioning, or the economic interests, of the government or a private party.⁹⁴

Without these extra elements, the false statements of fact criminalized under the Stolen Valor Act of 2005 fail to fall within any of the categories of unprotected speech articulated in *Stevens*.

2. False Statements of Fact—Their Own Category?

Even though “false statements” under section 704(b) do not fall within any of the currently unprotected categories of speech, the Court could recognize false statements of fact as a new category.⁹⁵ But when analyzed in terms of history and tradition, false statements of fact do not fall within the type of speech that has traditionally remained unprotected by the First Amendment and therefore do not constitute their own category of unprotected speech.

In *New York Times v. Sullivan*, the Supreme Court noted its tolerance of some “erroneous statement[s].”⁹⁶ Protection of some false speech is required to preserve the “breathing space that [freedoms of expression] need to survive.”⁹⁷ In other words, as the Ninth Circuit articulated, “the First Amendment requires that we protect some falsehood in order to protect speech that matters.”⁹⁸ Therefore, a category of unprotected speech for all false statements should not be created.

Despite this seemingly supported rationale, the Western District of Virginia, in *United States v. Robbins*, relied upon

⁹³ 18 U.S.C. § 912.

⁹⁴ *United States v. Alvarez*, 617 F.3d 1198, 1211-12 (9th Cir. 2010) (citing *United States v. Dunnigan*, 507 U.S. 87, 94 (1993) (involving a prosecution for perjury under 18 U.S.C. § 1621 (2006), cert. granted, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210); and 18 U.S.C. § 1035 (an example of a federal statute criminalizing falsities when trying to obtain health care benefits)).

⁹⁵ See *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

⁹⁶ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (stating that “erroneous statement is inevitable in free debate” (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963))).

⁹⁷ *Id.*

⁹⁸ *Alvarez*, 617 F.3d at 1203 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)) (internal quotation marks omitted).

Gertz v. Robert Welch, Inc. to support its conclusion that false statements of fact constitute their own category of unprotected speech.⁹⁹ The Court in *Gertz* described false statements of fact as “belong[ing] to that category of utterances . . . of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”¹⁰⁰ However, more recently in *Stevens*, the Court seemed to reject the approach utilized in *Gertz*, stating that “[t]he First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”¹⁰¹ According to the Supreme Court, the language articulated in *Gertz* was not a test to be applied to speech when determining whether it is an exception to First Amendment protection; rather, it was dictum.¹⁰² Even if the “speech is not very important” or lacks societal value, the Court seems to say that it cannot be influenced by these factors when determining whether government regulation has stepped too far.¹⁰³

Moreover, the Ninth Circuit, in *Alvarez*, explained that while some categorical exclusions do comprise false-statement speech, the falsity of speech alone is not enough to take it beyond the scope of First Amendment protection.¹⁰⁴ Despite relying on Supreme Court precedent, Judge Bybee, in his dissent, did not appear to fully refute the majority’s assertion.¹⁰⁵ For example, when arguing that false statements of fact fall outside of First Amendment protection, Judge Bybee partially relied upon *Garrison v. Louisiana*, which states that “knowingly false statement[s] . . . do not enjoy constitutional protection.”¹⁰⁶ Yet the false statement in *Garrison* was defamatory and therefore had to be made with “actual malice.”¹⁰⁷

⁹⁹ *United States v. Robbins*, 759 F. Supp. 2d 815, 817-18 (W.D. Va. 2011) (citing *Gertz*, 418 U.S. at 339-40).

¹⁰⁰ *Gertz*, 418 U.S. at 340 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

¹⁰¹ *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010).

¹⁰² *Id.* at 1585-86.

¹⁰³ *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 826 (2000).

¹⁰⁴ *United States v. Alvarez*, 617 F.3d 1198, 1214-15 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210).

¹⁰⁵ *Id.* at 1219 (Bybee, J., dissenting) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)).

¹⁰⁶ *Id.*

¹⁰⁷ *Compare Garrison*, 379 U.S. at 75, with *Alvarez*, 617 F.3d at 1219 (Bybee, J., dissenting).

Overall, false statements of fact, without more, have historically been protected by the First Amendment and should not be classified as their own category of unprotected speech.

B. The Stolen Valor Act of 2005—An Unconstitutional Content-Based Restriction

Since the Stolen Valor Act regulates protected speech, the Act is subject to further constitutional analysis.¹⁰⁸ In addition to the distinction between protected and unprotected speech, the Supreme Court has differentiated between content-neutral and content-based regulations.¹⁰⁹ If the regulation is content-based, then the regulation is presumptively invalid; the government may rebut this presumption by showing that the law passes strict scrutiny,¹¹⁰ “the most demanding test known to constitutional law.”¹¹¹ Under this standard, the Stolen Valor Act of 2005 is unconstitutional because it sets forth a content-based restriction in section 704(b) and fails to satisfy strict scrutiny.

1. Content-Based Versus Content-Neutral Restrictions on Speech

Content-based restrictions prohibit or inhibit a type of speech based solely on its topic, whereas content-neutral restrictions regulate speech in general, regardless of its subject matter.¹¹² The Supreme Court has confirmed this distinction in a number of cases. In *United States v. Stevens*, the Supreme Court found a statute that prohibited “visual and audio depictions” in which “a living animal [was] intentionally harmed” to be content-based.¹¹³ In *Police Department of Chicago v. Mosley*, the Court also found the City’s regulation content-based where the statute prohibited all peaceful picketing next to schools except if the picketing related to a “school’s labor-management

¹⁰⁸ Compare *Alvarez*, 617 F.3d at 1217, and *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1187-92 (D. Colo. 2010), with *United States v. Robbins*, 759 F. Supp. 2d 815, 821 (W.D. Va. 2011).

¹⁰⁹ See, e.g., *Schact v. United States*, 398 U.S. 58, 63 (1970); see also Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 278 (2009). See generally Christopher M. Schultz, Note, *Content-Based Restrictions on Free Expression: Reevaluating the High Versus Low Value Speech Distinction*, 41 ARIZ. L. REV. 573 (1999).

¹¹⁰ *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

¹¹¹ *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

¹¹² See, e.g., *Police Dep’t. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972); *Schact*, 398 U.S. at 63; see also Stone, *supra* note 109, at 278.

¹¹³ *Stevens*, 130 S. Ct. at 1584.

dispute.”¹¹⁴ The Court in *Mosley* noted, however, that had the city ordinance prohibited all peaceful picketing without exception, the statute would have been content-neutral.¹¹⁵

The Stolen Valor Act of 2005 prohibits false statements of fact only when the statements misrepresent the individual’s receipt of a military award.¹¹⁶ Similar to the statutes at issue in *Stevens* and *Mosley*, the Act requires the government to look at the content of the expression to determine whether the speech is prohibited. Therefore, the Stolen Valor Act of 2005 is a content-based restriction on speech.

2. Applying Strict Scrutiny

As a content-based restriction on protected speech, the Act is subject to strict scrutiny. To pass constitutional muster under strict scrutiny, the government must prove that the statute at issue “serve[s] a compelling state interest and that it is narrowly drawn to achieve that end.”¹¹⁷ Ultimately, the Stolen Valor Act of 2005 fails to satisfy either element of this test.

a. Government Interest

In order to pass strict scrutiny, the government first bears the burden of showing that the statute is supported by a “compelling government interest.”¹¹⁸ A compelling government interest is one “of the highest order”¹¹⁹ and very few government interests are able to meet this standard.¹²⁰ If there is no “compelling government interest” for the Stolen Valor Act of 2005, the Act will not pass constitutional muster.¹²¹ Even though the government may conceivably present a few purposes that support the Act, none is compelling.

The primary purpose of the Act is to protect the “sacrifice, history, reputation, honor and meaning associated with military

¹¹⁴ *Mosley*, 408 U.S. at 95.

¹¹⁵ *See id.*

¹¹⁶ *See* 18 U.S.C. § 704(b) (2006).

¹¹⁷ *Boos v. Barry*, 485 U.S. 312, 321 (1988) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1982)).

¹¹⁸ *Id.*

¹¹⁹ *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

¹²⁰ *See, e.g., Sable Comm’ns of Cal., Inc. v. Fed. Comm’ns Comm’n*, 492 U.S. 115, 130 (1989) (holding the protection of the physical and psychological well-being of minors is a compelling government interest supporting the regulation of obscene telephone calls); *Haig v. Agee*, 453 U.S. 280, 307 (1981) (holding national security as a compelling government interest).

¹²¹ *Yoder*, 406 U.S. at 215.

medals and decorations.”¹²² The Act is also meant to incentivize acts of meritorious bravery.¹²³ In other words, if anyone can claim that he or she has a military award, the incentive value of the award diminishes.¹²⁴ While the Ninth Circuit and the District of Colorado recognized that these are *important* government interests,¹²⁵ they are not *compelling*. Due to congressional authority to “raise and support armies,” courts generally give more deference to regulations with military purposes, especially when those purposes are “unrelated to the suppression of speech.”¹²⁶ However, as the District of Colorado noted, there is no precedent that the Act’s interests are compelling.¹²⁷

National security is the closest recognized compelling interest because incentivizing acts of valor and maintaining the reputation of the military strengthens the nation’s defense.¹²⁸ Nevertheless, the absence of the Act’s protection would not create disarray or malfunction great enough to threaten national security. The Act simply seeks to protect a rewards system, albeit a very important and honorable system, but not something that upholds the security of the nation.¹²⁹ Additionally, precedent suggests that the putative interests behind the Stolen Valor Act of 2005 are not compelling. In *Texas v. Johnson*, the Supreme Court struck down a statute that criminalized flag burning because the interest put forward by the government, “preserving the flag as a symbol of national unity,” was insufficiently compelling.¹³⁰ According to the Supreme Court, “To conclude that the government may permit designated symbols to be used to communicate only a limited

¹²² United States v. Strandlof, 746 F. Supp. 2d 1183, 1189 (D. Colo. 2010).

¹²³ *Id.* at 1190.

¹²⁴ *Id.*

¹²⁵ United States v. Alvarez, 617 F.3d 1198, 1217 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210); *see Strandlof*, 746 F. Supp. 2d at 1189-91.

¹²⁶ *See* United States v. Perelman, 737 F. Supp. 2d 1221, 1238 (D. Nev. 2010) (citing United States v. O’Brien, 391 U.S. 367, 377 (1968)); Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 926-27 (C.D. Cal. 2010).

¹²⁷ Order for Supplemental Briefing, United States v. Strandlof, 746 F. Supp. 2d 1183 (D. Colo. 2010) (No. 09-cr-00497-REB), 2009 WL 5126540, at *2.

¹²⁸ *See* Haig v. Agee, 453 U.S. 280, 307 (1981) (holding national security as a compelling government interest).

¹²⁹ For a description of the United States’ awards system and a description of the evolution of heraldry, *see Ribbons—Order of Precedence*, INSTITUTE OF HERALDRY, http://www.tioh.hqda.pentagon.mil/Awards/order_of_precedence.aspx (last visited Sept. 3, 2011); *What Is Heraldry*, INSTITUTE OF HERALDRY, <http://www.tioh.hqda.pentagon.mil/Heraldry/heraldry.aspx>.

¹³⁰ *Texas v. Johnson*, 491 U.S. 397, 410 (1989).

set of messages would be to enter a territory having no discernible or defensible boundaries.”¹³¹

Furthermore, the judiciary treats the secondary interest regarding incentives with equal, if not more, disfavor. Both the District of Colorado and the Ninth Circuit were skeptical that a soldier’s act of valor is solely motivated by a medal.¹³² After all, soldiers performed acts of bravery well before the existence of military awards.¹³³ By arguing that military decorations incentivize valor, the government in fact diminishes the value of the valorous acts it claims to protect.¹³⁴

Though not all courts have addressed whether the government’s interests in issuing awards of commendation are compelling, not a single court has held that they are. While the Ninth Circuit avoided a clear holding on this issue, the District Court of Colorado clearly indicated that the government interests are not compelling.¹³⁵ In conclusion, the Stolen Valor Act of 2005 does not serve any “compelling government interest” and therefore fails the first prong of strict scrutiny.

b. Narrow Tailoring

Even if a court finds an asserted government interest compelling, the Stolen Valor Act of 2005 would still fail strict scrutiny because it is not narrowly tailored.¹³⁶ In order to meet this standard, the Act must utilize the “least restrictive means” to further the government interest.¹³⁷ The Stolen Valor Act of 2005 fails to meet this standard due to the vast number of alternative, less restrictive measures the government could have implemented in lieu of the Act.

For example, in *Alvarez*, the Ninth Circuit suggested that if the Act were restructured to include elements of mens rea and injury, it may pass constitutional muster.¹³⁸ In fact, if the Act were amended to attach only when another individual’s reliance on falsities were to his or her detriment, the Act would more closely resemble a fraud statute (a category of unprotected speech).¹³⁹

¹³¹ *Id.* at 417.

¹³² *United States v. Alvarez*, 617 F.3d 1198, 1216 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210); *Strandlof*, 746 F. Supp. 2d at 1190-91.

¹³³ GENERAL ORDERS OF GEORGE WASHINGTON, *supra* note 41, at 30-31.

¹³⁴ *Strandlof*, 746 F. Supp. 2d at 1190-91.

¹³⁵ *Id.*; *Alvarez*, 617 F.3d at 1216.

¹³⁶ *Boos v. Barry*, 485 U.S. 312, 321 (1988).

¹³⁷ *Sable Commc’ns of Cal., Inc. v. Fed. Commc’ns Comm’n*, 492 U.S. 115, 130 (1989).

¹³⁸ *Alvarez*, 617 F.3d at 1209-11.

¹³⁹ *See supra* Part II.A.1.

Aside from amending the Act, the court also suggested that there may be no need for a criminal statute at all.¹⁴⁰ As declared by the Supreme Court in *Texas v. Johnson*, “If there be time to expose through discussion the falsehood and fallacies, to overt the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”¹⁴¹ Since the Stolen Valor Act of 2005 punishes the statements solely because they are false, more speech that unveils the falsehood could be sufficient to deter the lies. In turn, law enforcement would not need to waste its time prosecuting.

The Ninth Circuit also suggested that the following were less restrictive means to achieve the government’s goals: “publicizing the names of legitimate recipients or false claimants, creating an educational program, [or] prohibiting the act of posing as a veteran to obtain certain benefits.”¹⁴²

Altogether, the government could have used less restrictive means that would not have burdened individuals’ First Amendment rights. Although not all courts have analyzed the tailoring of the Act, the Ninth Circuit’s suggestions appear reasonably valid.¹⁴³ Overall, the Stolen Valor Act of 2005 fails both prongs of strict scrutiny and is therefore unconstitutional.

C. *The Stolen Valor Act of 2005—Unconstitutionally Overbroad and Void-for-Vagueness*

Even though the Stolen Valor Act of 2005 should be struck down as a content-based restriction of constitutionally protected speech, the Act may also fail scrutiny under the overbreadth and void-for-vagueness doctrines.¹⁴⁴ Under both of these doctrines, the Stolen Valor Act of 2005 is unconstitutional.

1. Overbreadth Doctrine

The First Amendment’s overbreadth doctrine may be used to facially challenge a statute if the statute is either a content-neutral or a content-based restriction on protected speech or if it regulates unprotected speech.¹⁴⁵ According to the

¹⁴⁰ *Alvarez*, 617 F.3d at 1216.

¹⁴¹ *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

¹⁴² *Alvarez*, 617 F.3d at 1210.

¹⁴³ *Id.* at 1217.

¹⁴⁴ *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-504 (1982); *Grayned v. City of Rockford*, 408 U.S. 104, 108-22 (1972).

¹⁴⁵ *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

Supreme Court, “the party challenging the law must demonstrate not just from the text of the statute, but also from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally.”¹⁴⁶ If the facial challenge is successful, “the prosecution fails regardless of the nature of the defendant’s own conduct, because [it] renders a statute unconstitutional and invalid in all its applications.”¹⁴⁷ Because an overbreadth challenge will render an entire statute invalid even if the statute has no unconstitutional effect as applied, the Court is generally reluctant to strike down legislation under this doctrine.¹⁴⁸ Despite this reluctance, the Stolen Valor Act of 2005 may be struck down as facially overbroad.

As recognized by the dissent in *Alvarez*, penned by Judge Bybee, there are at least two ways section 704(b) may be overbroad.¹⁴⁹ First, Judge Bybee conceded that the Act may reach “inadvertent violations of the act” due to the lack of a scienter requirement.¹⁵⁰ Second, the Act gives no exception for “satire or imaginative expression,” both historically protected speech.¹⁵¹ Whether these mistaken and theatrical statements are substantial enough to create a realistic threat is a difficult question to answer.¹⁵² However, it appears that the Act under these circumstances would cut into private conversations and chill speech historically protected by the First Amendment.¹⁵³

To determine whether either of these examples of overreaching is sufficient to support an overbreadth challenge, the first step is to ask “whether the Stolen Valor Act actually covers” mistaken or theatrical statements.¹⁵⁴ When interpreting statutes under this doctrine, courts do “not lightly assume that Congress intended to infringe constitutionally protected liberties” and therefore look for a “limiting construction” that

¹⁴⁶ *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 14 (1988).

¹⁴⁷ *Alvarez*, 617 F.3d at 1236 (Bybee, J., dissenting) (quoting *Wurtz v. Risley*, 719 F.2d 1438, 1440 (9th Cir. 1983); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483 (1989)).

¹⁴⁸ *United States v. Esparza-Ponce*, 193 F.3d 1133, 1137 (9th Cir. 1999) (quoting *Broadrick*, 413 U.S. at 613).

¹⁴⁹ *Alvarez*, 617 F.3d at 1236 (Bybee, J., dissenting).

¹⁵⁰ *Id.* at 1236-37.

¹⁵¹ *Id.* at 1222.

¹⁵² *See N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 14 (1988).

¹⁵³ *See Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 57 (1988) (holding that liability for publishing an ad parody is inconsistent with the First Amendment); *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 14 (1970) (holding that liability for publishing rhetorical hyperbole “would subvert the most fundamental meaning of a free press”).

¹⁵⁴ *Alvarez*, 617 F.3d at 1237 (Bybee, J., dissenting).

could avoid overbreadth.¹⁵⁵ Judge Bybee, in his *Alvarez* dissent, and Judge Jones, in *United States v. Robbins*, used two different approaches to limit the Stolen Valor Act's construction.¹⁵⁶ Neither of the constructions seems sufficient to overcome an overbreadth challenge.

In *Robbins*, Judge Jones of the Western District of Virginia asserted that the Stolen Valor Act of 2005 should be read to only address “knowingly false statements” where “the defendant *intended to deceive*.”¹⁵⁷ Judge Jones concluded that this limiting construction would not suppress ambiguous, mistaken, or misunderstood statements, nor punish “false statement in fictions, in parody, or as rhetorical hyperbole;” “only outright lies, not ideas, [would be] punishable.”¹⁵⁸

While this approach does limit the Act to avoid overbreadth, the construction also seems to be impermissible. Perhaps interpreting the statute to include a “knowing” element would be permissible, but assuming an “intent to deceive” does not seem appropriate when no actual words in the statute support that notion. In support of the specific intent, Judge Jones cited two cases.¹⁵⁹ Each case involved facial challenges against a statute criminalizing false representations of United States citizenship.¹⁶⁰ In the first case, the Ninth Circuit in *United States v. Esparza-Ponce* considered statutory language “mak[ing] it a crime for anyone to knowingly and falsely represent himself to be a citizen of the United States without regard” to whom the statement was made. The statute should be read, the Court held, to require proof that “the person to whom [the] false statement was made had good reason to inquire into the nationality status.”¹⁶¹ In the second case, the Second Circuit held in *United States v. Achtner* that “representation of citizenship must still be made to a person having some right to inquire or adequate reason for

¹⁵⁵ *United States v. Robbins*, 759 F. Supp. 2d 815, 818 (W.D. Va. 2011) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988)).

¹⁵⁶ Compare *Alvarez*, 617 F.3d at 1237-41 (Bybee, J., dissenting), with *Robbins*, 759 F. Supp. 2d at 818-19.

¹⁵⁷ *Robbins*, 759 F. Supp. 2d at 819.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* (citing *United States v. Esparza-Ponce*, 193 F.3d 1133, 1137-38 (9th Cir. 1999); *United States v. Achtner*, 144 F.2d 49, 52 (2d Cir. 1944)).

¹⁶⁰ *Id.*

¹⁶¹ *Esparza-Ponce*, 193 F.3d at 1137 (quoting *Smiley v. United States*, 181 F.2d 505, 507-08 (9th Cir. 1950)).

ascertaining a defendant's citizenship."¹⁶² In both of these cases, the courts pointed out that the limiting construction they applied to the statute already existed prior to the facial challenges brought before them.¹⁶³ Using the Supreme Court's analysis in *Reno v. ACLU*, the Ninth Circuit noted that even though courts may impose limiting constructions if there is not one already in place, to impose a new one, the statute must be "readily susceptible to th[e] construction."¹⁶⁴

No court had implemented a limiting construction of the Stolen Valor Act of 2005 prior to Judge Jones's attempt in *Robbins*.¹⁶⁵ Further, section 704(b) does not appear to be "readily susceptible" to the limiting construction Judge Jones sought to employ. To begin with, neither of the cases Judge Jones cited limits the construction of the statute to include a specific intent of the perpetrator.¹⁶⁶ Additionally, no words or phrases in the statute imply that Congress meant to require the specific *intent to deceive*.¹⁶⁷

In *ACLU of Georgia v. Miller*, the Northern District of Georgia rejected the government's suggestion to engraft onto a statute the specific intent to deceive or defraud.¹⁶⁸ The statute made it a crime for

any person . . . knowingly to transmit any data through a computer network . . . for the purpose of setting up, maintaining, operating, or exchanging data with an electronic mailbox, home page, or any other electronic information storage bank or point of access to electronic information if such data uses any individual name . . . to falsely identify the person¹⁶⁹

The district court noted that "[b]y its plain language the criminal prohibition applies regardless of whether a speaker has any intent to deceive or whether deception actually occurs."¹⁷⁰ Additionally, the phrases *intent to deceive* and *intent to defraud* appear nowhere in the language of the statute, despite the "express[] inclu[sion] [of such phrases] in other Georgia criminal

¹⁶² *Achtner*, 144 F.2d at 52.

¹⁶³ *Esparza-Ponce*, 193 F.3d at 1137; *Achtner*, 144 F.2d at 52.

¹⁶⁴ *Esparza-Ponce*, 193 F.3d at 1138 (citing *Reno v. ACLU*, 521 U.S. 844, 884 (1997)).

¹⁶⁵ See *United States v. Robbins*, 759 F. Supp. 2d 815, 818-19 (W.D. Va. 2011) (applying a new limiting construction and noting that the statute must be readily susceptible to it, implying that the limiting construction had not yet been employed).

¹⁶⁶ See *Esparza-Ponce*, 193 F.3d at 1137-38; *Achtner*, 144 F.2d at 52.

¹⁶⁷ See *Stolen Valor Act of 2005*, 18 U.S.C. § 704(b) (2006).

¹⁶⁸ *ACLU of Ga. v. Miller*, 977 F. Supp. 1228, 1232-33 (N.D. Ga. 1997).

¹⁶⁹ *Id.* at 1230.

¹⁷⁰ *Id.* at 1232.

statutes which require proof of specific intent.”¹⁷¹ Moreover, the district court asserted that although the word *falsely* does appear in the statute, it is not synonymous with *intent to deceive* or *intent to defraud*.¹⁷² “‘Falsely’ means merely ‘wrongly,’ ‘incorrectly,’ or ‘not truthfully.’”¹⁷³

Here, the plain language of the Stolen Valor Act of 2005 applies “regardless of whether a speaker has any intent to deceive.”¹⁷⁴ The Act omits the phrases *intent to deceive* and *intent to defraud*—phrases that Congress expressly uses in other federal criminal statutes.¹⁷⁵ Furthermore, while the Act uses the word *falsely*, the Act cannot be construed to require a specific intent based on the use of this word because *falsely* is by no means synonymous with an *intent to deceive*.¹⁷⁶ Thus, the Stolen Valor Act of 2005 does not appear to be “readily susceptible” to Judge Jones’s limiting construction requiring a specific intent.

In *Alvarez*, Judge Bybee applied a different limiting construction. But the construction is still insufficient to satisfy the overbreadth doctrine. Judge Bybee based his limiting construction upon the interpretation of the word *represents* in the Act, calling upon *Webster’s Dictionary’s* “first definition of the word . . . [t]o bring clearly before the mind: [to] cause to be known . . . [to] present esp. by description.”¹⁷⁷ With this definition in mind, Judge Bybee asserted that “an ambiguous statement that could conceivably be misinterpreted to claim receipt of a military award could not be punished under the Act because such a statement would not ‘bring clearly before the mind’ of the listener that the speaker has described himself as having won the award.”¹⁷⁸ He also argued that the Act would not apply under his construction to “satirical or theatrical

¹⁷¹ *Id.*

¹⁷² *Id.* at 1232 n.4.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1232.

¹⁷⁵ *See, e.g.*, 18 U.S.C. § 1343 (2006) (“Whoever, having devised or *intending to devise any scheme or artifice to defraud*, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.” (emphasis added)).

¹⁷⁶ *Miller*, 977 F. Supp. at 1232 n.4.

¹⁷⁷ *United States v. Alvarez*, 617 F.3d 1198, 1238 (9th Cir. 2010) (Bybee, J., dissenting) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1926 (2002)), *cert. granted*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210).

¹⁷⁸ *Id.*

statements claiming receipt of a military award” because any such statements would be “entirely untrue.”¹⁷⁹

Concededly, Judge Bybee’s limiting construction is compelling; it could easily be implemented to restrict the reach of the Stolen Valor Act of 2005. However, Judge Bybee seemed to focus on a very narrow portion of the meaning of *represent* and creates a misimpression as to how effective this limiting construction would be. For example, *Webster’s Dictionary* also indicates that *represent* is defined as “to serve as a sign or symbol of,” “to portray or exhibit in art,” “to serve as the counterpart image of,” “to produce on the stage,” “to act the part or role of,” and “to describe as having a specified character or quality.”¹⁸⁰ Additionally, while *Webster’s Dictionary’s* first definition is “to bring clearly before the mind,” *Oxford Dictionaries* lists first, to “be entitled or appointed to act or speak for (someone), especially in an official capacity.”¹⁸¹ That first definition is followed by “constitute; amount to” and “depict (a particular subject) in a picture or other work of art.”¹⁸² In the legal context, the Federal Circuit has found the definition of *represent* to include, “to be an accredited deputy or substitute for (a number of persons) in a legislative or deliberative assembly,” “to describe as having a specified character or quality; to give out assert or declare to be of a certain kind,” and “to symbolize, to serve as a visible or concrete embodiment.”¹⁸³ With this fuller understanding of the meaning of *represent*, the possibility that the Act would still impermissibly punish works of satire, fiction, and parody seems markedly clear.

In addition, the Act would still apply to mistaken remarks regarding receipt of military awards because the definition Judge Bybee relies upon focuses on the point of view of the listener, not the speaker. An individual prosecuted under the Act need not even realize that he or she created a misimpression,

¹⁷⁹ *Id.* at 1240-41.

¹⁸⁰ *Represent Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/represent?show=0&t=1309095986> (last visited July 10, 2011).

¹⁸¹ *Represent Definition*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/represent?region=us> (last visited July 10, 2011).

¹⁸² *Id.*

¹⁸³ *McEntee v. Merit Sys. Prot. Bd.*, 404 F.3d 1320, 1333-34 (Fed. Cir. 2005) (citing OXFORD ENGLISH DICTIONARY 657-58 (2d ed. 1989)) (determining under the Hatch Act whether the employee stood for mayoral election “as representing party” for “partisan political office”).

but the statement he or she made still may have “br[ought] [that misimpression] clearly before the mind” of the listener.¹⁸⁴

Overall, the two limiting constructions offered by Judge Bybee and Judge Jones do not appear to prevent the Act’s application to mistaken or theatrical statements. Even though it is difficult to determine whether these applications of the Act are substantial enough, it appears that no reasonable limiting construction would be able to refute a facial challenge of the overbreadth of the Stolen Valor Act of 2005. Although no court has so held, the Act is facially invalid under the First Amendment because it is overbroad.

2. Void-for-Vagueness Doctrine

In general, when the Court applies the overbreadth doctrine, it also analyzes the regulation in terms of *void-for-vagueness*.¹⁸⁵ Under this analysis, a law must “state explicitly and definitely what acts are prohibited, so as to provide fair warning and preclude arbitrary enforcement.”¹⁸⁶ The Supreme Court has asserted that the more important element of the two is the principle regarding enforcement guidelines proffered by the legislature.¹⁸⁷ “Where the legislature fails to provide such minimal guidelines, a criminal statute may permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’”¹⁸⁸

In his overbreadth analysis of the Act, Judge Bybee contended that the term *represents* guides law enforcement in restricting the sweep of the statute.¹⁸⁹ However, reliance upon law enforcement’s interpretation of a word (especially a word that is defined in a plethora of ways) does not completely prevent arbitrary enforcement. Thus, in light of the way the Stolen Valor Act of 2005 is written, there is nothing to stop its arbitrary enforcement without “explicit[]” or “definite[]” guidelines.

¹⁸⁴ *Alvarez*, 617 F.3d at 1238 (Bybee, J., dissenting). Perhaps if this limiting construction were combined with a requirement that the individual knowingly make the false statements, then the Act would pass constitutional muster under the overbreadth doctrine. However, while *knowingly* may be a construction the Act is readily susceptible to, Congress has expressly included a knowledge requirement in other statutes when it intended for knowledge to be an element of the crime.

¹⁸⁵ See *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-504 (1982); *Grayned v. City of Rockford*, 408 U.S. 104, 108-14 (1972).

¹⁸⁶ BLACK’S LAW DICTIONARY 754 (3d pocket ed. 2006).

¹⁸⁷ *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

¹⁸⁸ *Id.* (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

¹⁸⁹ See *Alvarez*, 617 F.3d at 1237-38 (Bybee, J., dissenting).

Furthermore, the Act does not provide citizens “actual notice” of what statements are truly punishable within the ambiguities of the word *represents*.¹⁹⁰ Because of this lack of notice, the Act has the ability to “chill” speech in contravention of First Amendment purposes. Only Judge Bybee, in his dissent, has analyzed the Act under the void-for-vagueness doctrine. Despite this, it seems apparent that the Act is void-for-vagueness and unconstitutional.

III. CONGRESS’S IMPERFECT PROPOSAL—THE STOLEN VALOR ACT OF 2011

Although the foregoing constitutional analyses provide a basis to strike down the Stolen Valor Act of 2005,¹⁹¹ in an attempt to fix the flaws in section 704(b), Congress proposed a new statute entitled the Stolen Valor Act of 2011.¹⁹² While the proposed bill provides a better means to police speech that steals valor, Congress has not addressed all of the flaws the courts have raised and may still be unable to receive a constitutional consensus among the courts.

A. *The Stolen Valor Act of 2011 Would Still Regulate Protected Speech*

Even though Congress attempted to distinguish the proposed bill from section 704(b) by criminalizing “misrepresentations” rather than “false claims,”¹⁹³ “misrepresentations” like “mere lies” or “false statements of fact” would likely not be deemed to hold their own category of unprotected speech under *Stevens*.¹⁹⁴ The “misrepresentations” in the proposed bill, however, do not completely stand alone; the bill requires specific “intent to obtain anything of value.”¹⁹⁵ While this added element may aid in avoiding First Amendment scrutiny, intent alone would likely not be sufficient without a requisite harm.

In his amicus curiae brief in *United States v. Strandlof*, Eugene Volokh argued that the Stolen Valor Act of 2005, if

¹⁹⁰ See Stolen Valor Act of 2005, 18 U.S.C. § 704(b) (2006).

¹⁹¹ See *supra* Part II.

¹⁹² See Stolen Valor Act of 2011, H.R. 1775, 112th Cong. § 2 (2011).

¹⁹³ Compare Stolen Valor Act of 2005, 18 U.S.C. § 704 (2006), with H.R. 1775.

¹⁹⁴ See *supra* Part II.A.

¹⁹⁵ H.R. 1775.

construed to require knowing false statements, is constitutional. Professor Volokh asserted that

[p]eople who lie about decorations generally do so for a reason: They may want to get elected to public office, or to get more credibility for their own statements in another's election campaign, or to get more credibility in some nonelectoral political debate, or even just to get more respect from neighbors, acquaintances, and potential business associates. They are thus trying to manipulate people's behavior through falsehood, and their false claims are quite likely to indeed affect others' behavior (especially since having a military decoration is often seen as an especially important mark of good character).¹⁹⁶

Professor Volokh suggests that manipulating “private citizens’ behavior through falsehoods is a significant enough harm” on its own.¹⁹⁷ Therefore, there is no need to eliminate an express harm or injury requirement in the statute.¹⁹⁸ While Professor Volokh’s argument is consistent with the perceived unsavory nature of these misrepresentations, in striking the law down, the Ninth Circuit and the District Court of Colorado both found it persuasive that the Stolen Valor Act of 2005 does not require harm to be proven.¹⁹⁹

This contradiction may be due to Clay Calvert and Rebekah Rich’s suggestion that, after *Stevens*, the courts have shifted their constitutional analysis under the First Amendment from a more “value-based methodology”—which examines the societal value of the speech at issue and only protects speech that matters—to a “causation-of-harm-based methodology,” which focuses upon “the direct nexus (if any) between that speech and the alleged harms to humans that it causes.”²⁰⁰

This understanding of *Stevens* cuts against an argument that the misrepresentations contemplated by the Act should be given their own category of unprotected speech without a requisite harm. Further, there is no historical evidence that misrepresentations with specific intent but without requisite harm have been unprotected by the First Amendment.²⁰¹ The

¹⁹⁶ Eugene Volokh, *Amicus Curiae Brief: Boundaries of the First Amendment's "False Statements of Fact" Exception*, 6 STAN. J. C.R. & C.L. 343, 353-54 (2010).

¹⁹⁷ *Id.* at 354.

¹⁹⁸ *See id.*

¹⁹⁹ *See* United States v. Alvarez, 617 F.3d 1198, 1217 (9th Cir. 2010), cert. granted, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210); United States v. Strandlof, 746 F. Supp. 2d 1183, 1188 (D. Colo. 2010).

²⁰⁰ Calvert & Rich, *supra* note 50, at 4.

²⁰¹ *See supra* Part II.A.2.

courts' recent shift to a "causation-of-harm-based methodology"²⁰² coupled with the reluctance of lower courts to carve out new categories of unprotected speech²⁰³ suggest that courts will not find that the Stolen Valor Act of 2011 regulates unprotected speech.

B. The Proposed Bill Would Still Be a Content-Based Restriction Subject to Strict Scrutiny

In addition to regulating protected speech, just as section 704(b) was a content-based restriction,²⁰⁴ the proposed legislation, which regulates misrepresentations regarding one's military service, would also be a content-based restriction. Therefore, the proposed bill would likely be subject to strict scrutiny.²⁰⁵

The government's purported interest behind the Stolen Valor Act of 2011 would likely go further than the Stolen Valor Act of 2005. Potentially, the government could argue that the proposed bill protects not just the reputation of the awards but the reputation of the entire military. This expanded government interest may be found compelling under a strict scrutiny analysis, despite a lack of precedent. First, the interest does not run afoul of *Texas v. Johnson*, which took issue with "preserving the flag as a symbol of national unity,"²⁰⁶ because "symbols" such as the military awards and decorations of section 704(b) are not the only content regulated by the proposed legislation. Additionally, because the government interest is a broader military purpose, it may receive the deference that courts generally give to military purposes in line with the congressional authority to "raise and support armies."²⁰⁷

Despite the seemingly compelling nature of this government interest, preserving the reputation of the military, a government entity, presents a conflict with a traditional First Amendment policy of preventing statutes providing for "government . . . self-preservation."²⁰⁸ As Geoffrey Stone

²⁰² Calvert & Rich, *supra* note 50, at 4.

²⁰³ See *supra* Part II.A.2.

²⁰⁴ See *supra* Part II.B.1.

²⁰⁵ See *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

²⁰⁶ *Texas v. Johnson*, 491 U.S. 397, 417 (1989).

²⁰⁷ See, e.g., *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 926-27 (C.D. Cal. 2010); see also *United States v. Perelman*, 737 F. Supp. 2d 1221, 1238 (D. Nev. 2010).

²⁰⁸ *United States v. Alvarez*, 617 F.3d 1198, 1210 (9th Cir. 2010) (citing and discussing *N.Y. Times v. Sullivan*, 376 U.S. 254, 291 (1964); *Johnson*, 491 U.S. at 418-20, in terms of preventing government speech restrictions for purposes of self-preservation), *cert. granted*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210).

contends, in striking down self-preserving laws, the Court not only wishes to prevent legislators from using “the power of government to intimidat[e] [and] silence its critics,” but the Court also does not want the government “to dominate and manipulate public debate.”²⁰⁹ The government may breach this principle outwardly,²¹⁰ or it may do so pretextually, that is, by stating a permissible purpose while trying, in fact, to suppress opposition.²¹¹ Either way, the Court has illustrated that such regulations are unconstitutional.²¹²

For example, in *Schact v. United States*, the Court struck down a law that prohibited actors from wearing accurate military uniforms in theatrical productions that negatively portrayed the military.²¹³ This law was not only an attempt to censor critics of the Vietnam War, but was also an attempt to dominate the public arena with only positive associations between soldiers and the war.²¹⁴

While the statute in *Schact* seemed to be enacted with the express purpose to preserve the government, the Stolen Valor Act of 2011 would not seem to have the same purpose.²¹⁵ The proposed legislation is a response to inconsistent court rulings regarding the Stolen Valor Act of 2005’s constitutionality.²¹⁶ Further, the Stolen Valor Act of 2005 was a response to the increased crime perpetuated by the false representations.²¹⁷ Moreover, unlike the statute in *Schact*,²¹⁸ the misrepresentations of the Stolen Valor Act of 2011 do not depict the military in a negative light.²¹⁹ Thus, the bill does not aid in “silencing [government] critics,” nor does it “manipulate public

²⁰⁹ Stone, *supra* note 109, at 277.

²¹⁰ See, e.g., *Stevens*, 130 S. Ct. at 1582, 1592 (holding 18 U.S.C. § 48, which criminalized the creation, sale, or possession of certain depictions of animal cruelty, unconstitutional).

²¹¹ See Stone, *supra* note 109, at 277-78 (discussing the “pretext effect’s strong suspicion of any government regulation that is consistent with . . . an impermissible motive such as suppressing particular ideas because they don’t want citizens to accept those ideas in the political process”).

²¹² See, e.g., *Stevens*, 130 S. Ct. at 1582, 1592 (holding 18 U.S.C. § 48, which criminalized creation, sale, or possession of certain depictions of animal cruelty, unconstitutional).

²¹³ *Schact v. United States*, 398 U.S. 58, 63 (1970).

²¹⁴ See *id.*

²¹⁵ See Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266 (2006).

²¹⁶ Compare *United States v. Alvarez*, 617 F.3d 1198, 1217 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210), and *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1192 (D. Colo. 2010), with *United States v. Robbins*, 759 F. Supp. 2d 815, 822 (W.D. Va. 2011).

²¹⁷ Davenport, *supra* note 17.

²¹⁸ *Schact*, 398 U.S. at 63.

²¹⁹ See Stolen Valor Act of 2005, 18 U.S.C. § 704(b) (2006).

debate.”²²⁰ Even though the Stolen Valor Act of 2011 could be perceived, as a matter of policy, as an impermissible regulation, policing misrepresentations regarding one’s military service does not seem to amount to actual government self-preservation.

Even if the Court deems the government’s interest compelling, the bill would still be subject to a narrow tailoring analysis under strict scrutiny. With the specific intent requirement, the proposed legislation is a less restrictive measure than the currently enacted section 704(b). However, without requisite harm the legislation does not seem to provide the “least restrictive means” to achieve the compelling government interest at stake.

As already indicated, Calvert and Rich suggest that harm caused by speech is now the central focus of First Amendment analysis.²²¹ Even though Volokh would likely suggest that misrepresentations themselves produce a significant enough harm to pass constitutional muster,²²² under a strict scrutiny analysis it is unlikely that a court invoking the “causation-of-harm-based methodology” would uphold the proposed legislation without a more express harm indicated in the statute.²²³ Therefore, the Stolen Valor Act of 2011 would likely be held unconstitutional under strict scrutiny and would not completely resolve the conflicts between the Stolen Valor Act of 2005 and the First Amendment.

C. The Stolen Valor Act of 2011 Would Not Be Overbroad or Void-for-Vagueness

In the event that the Stolen Valor Act of 2011 is deemed a regulation of unprotected speech, the Act would be subject to the overbreadth and void-for-vagueness doctrines instead of strict scrutiny.²²⁴ Under these two analyses, however, the Court would likely hold the proposed legislation constitutional, unlike the currently enacted section 704(b).

The proposed legislation not only requires that the misrepresentations be made knowingly but also that the misrepresentations be made with the specific intent to obtain

²²⁰ Stone, *supra* note 109, at 277.

²²¹ Calvert & Rich, *supra* note 50, at 4.

²²² See Volokh, *supra* note 196, at 353.

²²³ Calvert & Rich, *supra* note 50, at 4.

²²⁴ See *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-504 (1982); *Grayned v. City of Rockford*, 408 U.S. 104, 108-21 (1972).

anything of value.²²⁵ In interpreting the Stolen Valor Act of 2011, a limiting construction would not be necessary because the specific intent already restricts the reach of the proposed legislation to reduce its scope. The proposed act does not regulate speech in a manner that is overbroad like the Stolen Valor Act of 2005.²²⁶ Thus, the proposed legislation would not be unconstitutionally overbroad.

Similarly, with the addition of the specific intent requirement, more specific guidelines would be in place to prevent law enforcement from “pursu[ing] their personal predilections” and arbitrarily enforcing the criminal statute.²²⁷ Therefore, the proposed legislation would pass constitutional muster under the void-for-vagueness doctrine.

IV. SUGGESTED LEGISLATIVE MEASURES TO COMBAT SPEECH THAT STEALS VALOR

In proposing the new legislation, Congress recognized the value in policing speech that steals valor and the need for reconstructing the Stolen Valor Act of 2005 to avoid running afoul of the First Amendment.²²⁸ However, Congress’s proposed legislation does not appear to sufficiently amend the Act to pass constitutional muster. This note suggests two measures that will better police speech that steals valor. First, Congress should redraft the proposed legislation to resemble a fraud statute. Second, state and local legislatures should impose an eligibility requirement for individuals seeking to run for public office.

A. *Fraudulent Misrepresentations of Military Content—A Better Resolution*

To transform the Stolen Valor Act of 2011 into a fraud statute, Congress would need to add a harm element to the statute.²²⁹ Calvert and Rich suggest that Congress should draft a fraud statute that includes a “monetary harm” requirement.²³⁰ But the statute may be more effective if it were to include a less specific form of harm (such as obtaining a benefit that the perpetrator is

²²⁵ Stolen Valor Act of 2011, H.R. 1775, 112th Cong. § 2 (2011).

²²⁶ See *supra* Part II.C.1.

²²⁷ See *supra* Part II.C.2.

²²⁸ See H.R. 1775, § 2.

²²⁹ BLACK’S LAW DICTIONARY 300 (3d pocket ed. 2006).

²³⁰ Calvert & Rich, *supra* note 50, at 34.

not entitled to).²³¹ While a monetary harm may provide stricter guidelines for law enforcement to follow, as Volokh points out, these military lies are made for a variety of purposes, not just for money.²³² Additionally, Congress should eliminate the specific intent it has imposed in the 2011 Act and only cover knowing misrepresentations.²³³ The fraud statute would also be able to invoke the Stolen Valor Act of 2011's broader application to not just false representations about receiving military awards, but also misrepresentations about one's military service.²³⁴

By restructuring the statute to resemble fraud, Congress would be able to regulate unprotected speech and would only be subject to the overbreadth and void-for-vagueness doctrines, not strict scrutiny.²³⁵ Requiring knowledge and harm would aid in satisfying these doctrines because the statute would not punish inadvertent or mistaken misrepresentations—or satirical or imaginative expression.²³⁶ The special fraud statute would also avoid granting law enforcement too much discretion, which would lead to arbitrary enforcement.²³⁷

There are a few conceivable objections to creating a special fraud statute, but they do not appear to be compelling. First, some may argue that criminal sanctions are ineffective or too harsh.²³⁸ As already indicated, in *Texas v. Johnson*, the Supreme Court asserted that “[i]f there be time to expose through discussion the falsehood and fallacies, to overt the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”²³⁹ However, “more speech” is evidently an insufficient deterrent due to the increased incidence relating to these misrepresentations.²⁴⁰

Second, implementing a special fraud statute may be moot because there are already general fraud statutes in

²³¹ See, e.g., *United States v. Harmon*, 496 F.2d 20, 21 (2d Cir. 1974) (dismissing an indictment under 18 U.S.C. § 912 (1970) because it did not allege that defendant performed any acts).

²³² See Volokh, *supra* note 196, at 353-54.

²³³ See Part II.A.1 (describing fraud as requiring knowledge and a bona fide harm).

²³⁴ Stolen Valor Act of 2011, H.R. 1775, 112th Cong. § 2 (2011).

²³⁵ See, e.g., *United States v. Stevens*, 130 S. Ct. 1577, 1582, 1592 (2010); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-504 (1982); *Grayned v. City of Rockford*, 408 U.S. 104, 108-22 (1972).

²³⁶ See *supra* Part II.C.1 (analyzing the Stolen Valor Act of 2005 under the overbreadth doctrine).

²³⁷ See *supra* Part II.C.2.

²³⁸ *Texas v. Johnson*, 491 U.S. 397, 419 (1989) (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

²³⁹ *Id.*

²⁴⁰ Davenport, *supra* note 17.

place.²⁴¹ A separate and distinct fraud statute addressing misrepresentations of military content would, however, ensure that the problems arising from such statements would without question be addressed.²⁴² Moreover, Congress can impose an enhanced punishment for committing this specialized fraudulent act. In turn, prosecutors can not only charge a separate count on an indictment (and perhaps an extra conviction), but also incur greater deterrence. Furthermore, a fraud statute would be more effective than relying upon existing impersonation statutes. That is, fraud does not require the same requisite degree of conduct in furtherance of the misrepresentations.²⁴³

Third, as a matter of policy, some may argue that this specialized fraud statute is inconsistent with First Amendment principles. The Supreme Court has specifically tried to reveal and quash government interference with speech that attempts government self-preservation, government suppression of the democratic “marketplace of ideas,” and government repression of speech in times of crisis.²⁴⁴ In terms of government self-preservation, the Court is mainly concerned with legislators using “the . . . power of government to intimidat[e] [and] silence its critics.”²⁴⁵ Here, the purpose behind the specialized fraud statute is concededly to protect the reputation of the military, a government entity. However, the misrepresentations at issue do not portray or criticize the military in a negative light but rather serve as a tool to use military stature to one’s benefit.²⁴⁶ As for suppression of the “marketplace of ideas,” the Court seeks to uphold the people’s democratic self-governance by maintaining a free and open public forum for speech.²⁴⁷ When the government seeks to restrict speech that “convey[s] a political message, . . . a matter of public concern, or . . . a view point or opinion” regardless of any political underpinnings, the

²⁴¹ See *supra* Part II.A.1. The implementation of a fraud statute in this context may also be moot if the Supreme Court deems the Stolen Valor Act of 2005 constitutional in its review of *United States v. Alvarez*. *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210).

²⁴² Statements on Introduced Bills and Joint Resolutions, 151 CONG. REC. S12,684, S12,688 (Nov. 10, 2005) (statement of Sen. Conrad).

²⁴³ See *supra* Part II.A.1.

²⁴⁴ Stone, *supra* note 109, at 277-78.

²⁴⁵ *Id.* at 277.

²⁴⁶ For example, in *Schacht v. United States*, 398 U.S. 58, 63 (1970), the Court struck down a law prohibiting actors from wearing accurate military uniforms in theatrical productions that negatively portrayed the military.

²⁴⁷ See Lyriisa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 810.

Court seeks to protect it.²⁴⁸ While misrepresentations about one's military service could conceivably be considered a "matter of public concern," a special fraud statute would not chill or discourage speech because of the statutory limitations upon the punishable speech. Perhaps the Stolen Valor Act of 2005 chills speech because it reaches a broader range of lies including mistaken or satirical false statements,²⁴⁹ but the special fraud statute would not. An additional type of regulation the Court generally tries to prevent as a matter of policy arises "in times of crisis, real or imagined, [because] citizens and government officials tend to panic, to grow desperately intolerant, and to rush headlong to suppress speech they can demonize as dangerous, subversive, disloyal, or unpatriotic."²⁵⁰ This type of government regulation was present, for example, during World War I, when states attempted to promote national unity in response to xenophobic panic.²⁵¹ While the special fraud statute would be enacted partly in response to the increased amount of incidence relating to false statements of military commendation,²⁵² the statute would not be the type of poorly thought-out and excessive regulation the Court has sought to strike down.²⁵³ State and federal legislatures respond to increases in crime rates all the time. Thus, increased crime rates do not always constitute the type of crisis regulations the Supreme Court seeks to prevent.²⁵⁴

Therefore, restructuring the proposed legislation to resemble a fraud statute is a less restrictive and a more likely constitutional alternative to the existing Act. Further, a fraud statute would still be an effective means of meeting the government interests at stake.

²⁴⁸ *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1186 (D. Colo. 2010).

²⁴⁹ *See Stolen Valor Act of 2005*, 18 U.S.C. § 704(b) (2006).

²⁵⁰ Stone, *supra* note 109, at 278.

²⁵¹ *See* Jamie McNab, *The Supreme Court's Response to Nativism in the 1920's*, PRIMA: DAVIDSON COLLEGE'S ONLINE INT'L J. 3 (2003), http://www2.davidson.edu/academics/acad_depts/rusk/prima/Vol3Issue1/Nativism_edit.pdf; *see also* *Meyer v. Nebraska*, 262 U.S. 390, 396-97 (1923) (a teacher was prosecuted for teaching in the German language).

²⁵² Davenport, *supra* note 17.

²⁵³ *See* Stone, *supra* note 109, at 277-78.

²⁵⁴ *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 435 (2002) (holding that the government could reasonably rely on a study indicating a significant crime rate relating to the adult entertainment industry in order to regulate the industry by restricting speech).

B. Holding Public Officials Accountable

In addition to drafting a specific fraud statute, this note calls upon state and local legislatures to enhance eligibility requirements for individuals seeking to serve as elected officials. Public officials, such as Blumenthal and Kirk, have used their military status to further their political goals even when that status, in reality, is not what they made it out to be.²⁵⁵ Despite the exposure of their lies, these individuals are still being elected into office,²⁵⁶ which seems unsavory. After all, these individuals are seeking a position of power in a government while at the same time diminishing the honor of the military that serves to protect it.

The Constitution currently sets forth the minimum requirements to run for an elected position in the federal government.²⁵⁷ The Constitution requires of candidates a minimum age, a minimum time of citizenship, and legal residence within the area for which the candidate seeks to serve.²⁵⁸ In addition to these bare essentials, each state has general eligibility requirements for federal, state, and local level positions.²⁵⁹ For example, some states require that a candidate not be a convicted felon.²⁶⁰ In light of the recent political scandals, this note suggests that state and local legislatures should impose an additional eligibility requirement that individuals not misrepresent their military service. For example, the eligibility requirement could provide the following:

No person shall qualify as a candidate for elective public office or maintain a public office if already elected in the state of XX who has knowingly made misrepresentations regarding his or her military service during the course of any campaign for nomination or election to public office, by means of campaign materials, including an advertisement on radio, television, or the Internet, or in a newspaper or periodical, a public speech, or press release, with the intent to promote the election of that person.

²⁵⁵ See, e.g., Hernandez, *supra* note 1, at A1; Smith, *supra* note 9.

²⁵⁶ Haigh, *supra* note 16; Lighty & Sectar, *supra* note 16.

²⁵⁷ U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3.

²⁵⁸ U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3.

²⁵⁹ See, e.g., N.J. ADMIN. CODE § 19:3-5 (2009); WIS. CONST. art. XIII, § 3.

²⁶⁰ See, e.g., WIS. CONST. art. XIII, § 3, cl. 2 (“No person convicted of a felony, in any court within the United States, no person convicted in federal court of a crime designated, at the time of commission, under federal law as a misdemeanor involving a violation of public trust and no person convicted, in a court of state, of a crime designated, at the time of commission, under the law of the state as a misdemeanor involving a violation of public trust shall be eligible to any office of trust, profit or honor in this state unless pardoned of the conviction.”).

This eligibility requirement is similar to a criminal statute upheld by the Ohio Court of Appeals in *State v. Davis*:

(B) No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall purposely do any of the following:

....

(10) post, publish, circulate, or distribute a written or printed false statement, either knowing the same to be false or with reckless disregard of whether it was false or not, concerning a candidate that is designed to promote the election, nomination, or defeat of the candidate.²⁶¹

In *Davis*, the court examined this criminal sanction under strict scrutiny and found that the state had a compelling interest “to promote honesty in the election of public officers.”²⁶² According to the court, “[f]reedom of speech does not include a right to purposely, with knowledge of its falsity, publish a false statement about a candidate for public office with the intent to promote the election or defeat of such candidate.”²⁶³ The court also found the criminal statute narrowly tailored because it “expressly limits a conviction to cases where there is proof that the statements were known to be false or were made in reckless disregard of their falsity.”²⁶⁴

Despite this supportive precedent, holding public officials accountable for these misstatements, concededly, would be difficult. Other cases do not uphold a state’s interest in criminalizing false political campaign speech. In fact, one court found that “[t]he constitutional guarantee of free speech has its ‘fullest and most urgent application in political campaigns.’”²⁶⁵ For example, in *Brown v. Hartlage*, the Supreme Court struck down a criminal statute that sanctioned an elected official’s unfulfilled and false campaign promises.²⁶⁶ Even though the Court found that the State had legitimate interests in ensuring “that its governing political institutions

²⁶¹ *State v. Davis*, 499 N.E.2d 1255, 1258 (Ohio Ct. App. 1965) (citing OHIO REV. CODE ANN. § 3599.091(B)(10) (1965), amended by 1995 Ohio Laws 77 (S.B. 9) now codified at OHIO REV. CODE ANN. § 3517.21 (2011)).

²⁶² *Id.* (quoting *DeWine v. Ohio Elections Comm.*, 61 Ohio App. 2d 25, 29 (1978)).

²⁶³ *Id.* (quoting *DeWine*, 61 Ohio App. 2d at 29).

²⁶⁴ *Id.* at 1259.

²⁶⁵ *State ex. rel. Pub. Disclosure Comm’n v. 119 Vote No! Comm.*, 957 P.2d 691, 694 (Wash. 1998) (en banc) (quoting *Brown v. Hartlage*, 456 U.S. 45, 53 (1982)).

²⁶⁶ *Brown*, 456 U.S. at 53.

and officials properly discharge public responsibilities and maintain public trust . . . [and] in upholding the integrity of the electoral process itself," the Court did not find the interest to be compelling.²⁶⁷ Additionally, in *Washington ex. rel. Public Disclosure Commission v. 119 Vote No! Committee*, the Washington Supreme Court analyzed a criminal statute that sanctioned political candidates who "sponsor[ed] with actual malice . . . [p]olitical advertising that contain[ed] a false statement of material fact."²⁶⁸ This statute was similar to the statute at issue in *Garrison v. Louisiana*, which penalized statements criticizing a public official's conduct when made with actual malice.²⁶⁹ In both cases the statutes were struck down.²⁷⁰ In *Vote No!*, the court vigorously argued against the criminalization of false campaign speech, asserting that "[i]n political campaigns the grossest misstatements, deceptions, and defamations are immune from legal sanction unless they violate private rights—that is, unless individuals are defamed."²⁷¹ In addition to adverse precedent, Congress has exempted false political campaign advertisements from the Federal Trade Commission sanctions upon other types of false advertising.²⁷² Moreover, numerous scholars suggest that sanctioning false campaign speech would be an ineffective method because it would fuel voter alienation; afford yet another avenue for one candidate to attack her opponent; and lead to extensive litigation, civil or criminal, that would continue long after the election is over.²⁷³

²⁶⁷ *Id.* at 52.

²⁶⁸ *119 Vote No!*, 957 P.2d at 693 (quoting WASH. REV. CODE ANN. § 42.17.530(1)(a) (West 1998)).

²⁶⁹ *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

²⁷⁰ *Id.*; *119 Vote No!*, 957 P.2d at 699.

²⁷¹ *119 Vote No!*, 957 P.2d at 697 (quoting Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992)).

²⁷² See Undertaking Spam, Spyware, and Fraud Enforcement With Enforcers Beyond Borders Act of 2006, 15 U.S.C. § 45 (2006). Interestingly, these sanctions are imposed upon false advertising regarding commercial goods in an effort to protect consumers from making an ill-informed transaction. See *F.T.C. v. Cinderella Career & Finishing Schs., Inc.*, 404 F.2d 1308, 1313 (D.C. Cir. 1968); *Slough v. F.T.C.*, 396 F.2d 870, 872 (5th Cir. 1968). While a voter is not making an economic transaction, a voter is making a choice; a choice regarding who should be elected into a position of power over them. Even though Congress did not seem to think that the same protections need to be afforded to American voters, it seems as though false advertising in a political campaign can have the same effect of inducing an ill-informed decision. The counterargument, however, is that the American people are supposed to be the truth-finders during an election in order to uphold democratic principles, not the government. See *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223-24 (1989).

²⁷³ See, e.g., Clay Calvert, *When First Amendment Principles Collide: Negative Political Advertising & the Demobilization of Democratic Self-Governance*, 30 LOY. L.A. L. REV. 1539 (1997); Michael Kimmel, *A Proposal to Strengthen the Right of Response to*

However, the courts, Congress, and scholars have generally addressed false campaign speech that one candidate or political organization puts forth about the opponent.²⁷⁴ Here, the suggested eligibility requirement targets false statements about the individual's own résumé. In this situation, public officials are certainly able to bear this burden. Further, targeting this type of speech does not raise the same concerns of voter alienation and extensive litigation among opponents. The eligibility requirement would also circumvent the constitutional problems implicated by criminally sanctioning campaign speech because the "integrity of the electoral process" would be preserved in a less restrictive manner.²⁷⁵

In addition to a lack of criminalization, the eligibility requirement is further distinguishable from all of the statutes at issue in *Brown*, *Garrison* and *Vote No!*. In *Brown*, the statute sanctions speech that operates prospectively, whereas the misrepresentations in the eligibility requirement would target speech about one's past.²⁷⁶ In *Garrison*, the statute targeted statements made with actual malice, without regard to whether those false statements were made knowingly or were in fact false.²⁷⁷ Thus, the statute criminalized truthful statements as well as inadvertent or mistaken false statements.²⁷⁸ In *Vote No!*, the statute sanctioned false statements made with actual malice.²⁷⁹ While the statute did not criminalize truthful statements, it still had the ability to sanction inadvertent or mistaken false statements.²⁸⁰

Thus, the imposition of this eligibility requirement, which expressly prohibits individuals from obtaining or maintaining a government position if they misrepresent their military history, would likely provide a permissible and effective source of accountability.

Interestingly, if the eligibility requirement and the specialized fraud statute were enacted together, the eligibility requirement would enhance the effectiveness of the fraud statute. Prosecutors could not charge political candidates under the

Negative Campaign Commercials, 49 CATH. U. L. REV. 89 (1999); William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 297 (2004).

²⁷⁴ See, e.g., *119 Vote No!*, 957 P.2d 691; Marshall, *supra* note 273; Kimmel, *supra* note 273; Calvert, *supra* note 273.

²⁷⁵ *Brown v. Hartlage*, 456 U.S. 45, 52 (1982).

²⁷⁶ *Id.* at 54.

²⁷⁷ *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964).

²⁷⁸ See *State v. Davis*, 499 N.E.2d 1255, 1258-59 (Ohio Ct. App. 1965) (distinguishing the Ohio criminal sanction from the statute at issue in *Garrison*).

²⁷⁹ *119 Vote No!*, 957 P.2d at 693.

²⁸⁰ *Id.* at 696.

specific fraud statute due to the difficulty in establishing individualized detrimental reliance amongst voters. But the eligibility requirement would aid in expanding the reach of the fraud statute by holding politicians, such as Blumenthal or Kirk, accountable for their misrepresentations. Additionally, if public officials are held accountable for their misrepresentations, the publicity such political scandals receive will aid in enhancing the deterrence of the same behavior in private citizens by illustrating the ramifications of this behavior and exemplifying equality of treatment amongst the rulers and the people.

CONCLUSION

In sum, the Stolen Valor Act of 2005 is unconstitutional under the First Amendment because it is a content-based restriction on speech that fails to satisfy strict scrutiny. Under First Amendment principles, however, the type of speech the Stolen Valor Act seeks to prevent is not the type of speech the framers sought to protect. Due to the history of protecting military valor in the United States and the increased number of false representations of military service, legislators must take another path to deter this type of behavior. While Congress has begun an attempt at revising the Act, the proposed legislation is still unlikely to pass constitutional muster. Thus, Congress should instead restructure the Act to resemble a fraud statute. In addition, state and local governments should hold public officials accountable for such misrepresentations. An effective method of doing so would be to impose an eligibility requirement that prohibits, for individuals seeking an elected position, false claims of military valor and service. Overall, false claims of military valor are worth policing in some way. Legislatures should revitalize their original initiative behind the Stolen Valor Act of 2005 and invoke the aforementioned constitutional alternatives.

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