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FALSE VALOR: AMENDING THE STOLEN VALOR ACT TO CONFORM WITH THE FIRST AMENDMENT'S FRAUDULENT SPEECH EXCEPTION

Jeffery C. Barnum*

Abstract: The Stolen Valor Act (SVA or “the Act”) was enacted to protect against “fraudulent claims” of receipt of military honors or decorations. It does so by criminalizing false verbal or written claims regarding such awards. However, the Act failed to include all of the elements of an anti-fraud measure required by the First Amendment. Most critically, the SVA fails to require actual reliance on the part of the defrauded. Although fraud is generally not protected by the First Amendment, courts cannot construe the SVA as an anti-fraud measure if the statute does not require actual reliance. Therefore, the SVA as written has been subject to the higher strict scrutiny standard when challenged on First Amendment grounds. However, this oversight is easily remedied. Congress should amend the SVA to require that targets of the fraudulent claim alter their behavior based upon the false representation of military honors without necessarily suffering an economic injury. By modifying the SVA in this limited fashion, Congress will enable courts to construe the SVA as an anti-fraud measure while protecting against harm caused by false claims of military honors.

INTRODUCTION

Presenting the first military award for the Continental Army, General George Washington recognized those who had served with “bravery, fidelity and good conduct.”¹ General Washington expected “those gallant men” awarded this badge of recognition² would “on all occasions be treated with particular confidence and consideration.”³ General Washington also warned that “should any who are not entitled to these honors have the insolence to assume the badges of them they shall be severely punished.”⁴ Today, Americans generally show deference and

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1. 24 GEORGE WASHINGTON, *General Orders, August 7, 1782*, in THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, at 487 (John C. Fitzpatrick ed., 1938).

2. General Washington described the badge as “a narrow piece of white [cloth] of an angular form . . . to be fixed to the left arm on the uniform Coat.” *Id.*

3. *Id.*

4. *Id.*

respect to decorated military veterans.⁵

Shortly after General Washington made his pronouncement, the First Amendment was proposed and ratified.⁶ The First Amendment prohibits Congress from making any law “abridging the freedom of speech.”⁷ Because the guarantee of freedom of speech is so “intimate to liberty,”⁸ the First Amendment has profoundly impacted the functioning of American society.⁹ Although the First Amendment does not prohibit all government restrictions on speech,¹⁰ it allows such regulation only in certain limited circumstances.¹¹

These two values—respect for military valor and freedom of speech—collided when Congress enacted the Stolen Valor Act (SVA or “the Act”) in 2006. Although the wearing of unearned military decorations has been unlawful for many years,¹² Congress found the proscription on wearing unearned decorations insufficient to protect against “fraudulent claims” of unearned honors.¹³ Congress thus enacted the SVA, which prohibits any false verbal or written claims regarding receipt of military awards.¹⁴ For example, if an individual made a false claim to colleagues about receiving the Purple Heart, the federal government could prosecute under the SVA.¹⁵ In passing the SVA, Congress not only sought to protect the meaning of military awards themselves¹⁶ but also the public who relies upon the awards’ symbolic meaning.¹⁷

5. See, e.g., Karlyn Bowman & Andrew Rugg, Op-Ed, *Worth Saluting*, L.A. TIMES, May 30, 2011, at A23, available at 2011 WLNR 10765991; Clyde Haberman, *Renewed Respect for the Military*, N.Y. TIMES CITY ROOM (May 31, 2011, 8:30 AM), <http://cityroom.blogs.nytimes.com/2011/05/31/renewed-respect-for-the-military>.

6. The First Amendment was proposed in 1788 and ratified in 1791. 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 1:1, at 1-2 n.1 (2008).

7. U.S. CONST. amend I.

8. SMOLLA, *supra* note 6, § 1:1, at 1-2 n.3 (quoting *Schaefer v. United States*, 251 U.S. 466, 474 (1920)).

9. *Id.* at 1-2.

10. *Virginia v. Black*, 538 U.S. 343, 358 (2003) (“The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.”).

11. *United States v. Stevens*, 559 U.S. ___, 130 S. Ct. 1577, 1584 (2010) (listing categories of unprotected speech).

12. Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286.

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

14. 18 U.S.C. § 704(b) (2006).

15. See *id.*

16. Stolen Valor Act § 2.

17. See *infra* Part I.

In 2010, the Ninth Circuit heard the first free speech challenge to the SVA and declared it facially unconstitutional as an impermissible restriction on free speech.¹⁸ The government defended the SVA on the grounds that the Act proscribes only knowingly false speech,¹⁹ which the Supreme Court has held lacks any constitutional value or protection.²⁰ The Ninth Circuit rejected this argument on the grounds that a recent Supreme Court decision, *United States v. Stevens*,²¹ did not list false speech as an unprotected category.²² The Ninth Circuit then examined each of the *Stevens* categories of unprotected speech and concluded that the speech prohibited by the SVA does not fit in any of the established exceptions to the First Amendment.²³

While fraud is one of the categories of unprotected speech identified in *Stevens*,²⁴ the Ninth Circuit rejected construing the SVA as proscribing fraudulent speech.²⁵ Fraudulent speech requires actual reliance by the listener,²⁶ whereas the SVA does not require anything more than a false representation by the speaker to impose liability.²⁷ Additionally, the Ninth Circuit held that an anti-fraud statute must protect against an economic injury.²⁸

This Comment argues that while the Ninth Circuit was correct in requiring actual reliance as a prerequisite to construing the SVA as an anti-fraud statute, it erred by requiring an element of pecuniary injury. To remedy the statutory defect identified by the Ninth Circuit, this Comment suggests an amendment to the SVA that will address its constitutional infirmities while continuing to protect the public against false claims of military honors. Part I considers the symbolic nature of military decorations, the public's reliance on these decorations, and the

18. *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 11-210).

19. Government's Answering Brief at 14–15, *Alvarez*, 617 F.3d 1198 (No. 08-50345), 2009 WL 3760209.

20. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact.”).

21. 559 U.S. ___, 130 S. Ct. 1577 (2010).

22. *Alvarez*, 617 F.3d at 1206.

23. *Id.* at 1206–14.

24. *Stevens*, 130 S. Ct. at 1584.

25. *Alvarez*, 617 F.3d at 1212.

26. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003) (requiring an anti-fraud statute to include an intentional and material false statement designed to mislead the listener that succeeds in doing so); *see also infra* Part II.C.

27. 18 U.S.C. § 704(b) (2006).

28. *Alvarez*, 617 F.3d at 1211–12.

government's actions to protect the integrity of its symbols. Part II explores the SVA's history and purpose in addition to relevant First Amendment jurisprudence and its application to the SVA. Part III examines false personation, a subset of fraud that is similar to the conduct proscribed by the SVA. Part IV advocates for a narrow amendment to the SVA that only requires a victim's reliance as a precondition for liability but not a concurrent economic injury. Part IV also argues that a narrow amendment is possible because the SVA (as written or amended) conforms to other First Amendment mandates.

I. MILITARY HONORS REPRESENT AN INDIVIDUAL'S HISTORY AND CHARACTER THAT INFLUENCES OTHERS' BEHAVIOR

The Stolen Valor Act prohibits false claims of military honors, principally because “fraudulent claims” of military decorations diminish the symbolic power of those awards.²⁹ Military decorations imply certain personal or biographical details about the wearer that are relied upon by members of the public.³⁰ And the federal government has taken steps to prevent misappropriation of government symbols—including military decorations.³¹

A. *Military Decorations Express the Experience and Character of the Wearer*

Military decorations convey both historical and personal details about the wearer. The public reasonably assumes that an individual claiming a military decoration served in the armed forces.³² Military decorations may also indicate whether the claimant has served in specific situations. For example, an individual may display medals signifying service in Vietnam,³³ Afghanistan,³⁴ Iraq,³⁵ or Korea.³⁶ Armed forces members

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

30. *See infra* Part I.B.

31. *See infra* Part I.C.

32. DEP'T OF THE NAVY, NAVY AND MARINE CORPS AWARDS MANUAL 1-7 (2006), available at [https://awards.navy.mil/awards/webdoc01.nsf/\(vwDocsByID\)/DL060927142728/\\$file/1650.1H.pdf](https://awards.navy.mil/awards/webdoc01.nsf/(vwDocsByID)/DL060927142728/$file/1650.1H.pdf) (“Civilians are *not normally* awarded military decorations. In most cases, *non-military decorations* are available for specific services rendered by civilians, and they are considered more appropriate than military decorations.” (emphasis in original)).

33. Exec. Order No. 11,231, 30 Fed. Reg. 8665 (July 8, 1965) (authorizing the Secretary of Defense to create an award signifying service in Vietnam); *see also Vietnam Service Medal*, INST. HERALDRY, http://www.tioh.hqda.pentagon.mil/Awards/vietnam_service.aspx (last visited July 18, 2011).

may receive medals for non-combat duty, such as service in Antarctica³⁷ or outstanding volunteerism.³⁸ Other awards signify participation in combat.³⁹ The Purple Heart, for example, is awarded to individuals who receive wounds from hostile enemy action that require medical treatment.⁴⁰ Although the Purple Heart might denote *participation* in combat, it does not characterize the wearer's *performance* in combat.⁴¹

In addition to biographical details, an award may signify exemplary service and thus reflect upon the wearer's character. For example, armed services members receive the Distinguished Service Medal for "exceptionally meritorious service to the United States in a duty of great responsibility."⁴² Of course, not all individuals have the opportunity to serve in positions of "great responsibility."⁴³ However, they may still earn awards such as the Legion of Merit,⁴⁴ Meritorious Service Medal,⁴⁵ or a particular service achievement medal.⁴⁶

34. Act of May 28, 2004, Pub. L. No. 108-234, 118 Stat. 655; Exec. Order No. 13,363, 69 Fed. Reg. 70,175 (Dec. 2, 2004); *see also Afghanistan Campaign Medal*, INST. HERALDRY, http://www.tioh.hqda.pentagon.mil/Awards/afghanistan_campaign.aspx (last visited July 18, 2011).

35. 118 Stat. at 655; Exec. Order No. 13,363, 69 Fed. Reg. at 70,175; *see also Iraq Campaign Medal*, INST. HERALDRY, http://www.tioh.hqda.pentagon.mil/Awards/iraq_campaign.aspx (last visited July 18, 2011).

36. Exec. Order No. 10,179, 15 Fed. Reg. 7665 (Nov. 8, 1950); *see also Korean Service Medal*, INST. HERALDRY, http://www.tioh.hqda.pentagon.mil/Awards/korean_service.aspx (last visited July 18, 2011).

37. Act of July 7, 1960, Pub. L. No. 86-600, 74 Stat. 337; *see also Antarctica Service Medal*, INST. HERALDRY, http://www.tioh.hqda.pentagon.mil/Awards/antarctica_service.aspx (last visited July 18, 2011).

38. Exec. Order No. 12,830, 58 Fed. Reg. 4061 (Jan. 9, 1993); *see also Military Outstanding Volunteer Service Medal*, INST. HERALDRY, http://www.tioh.hqda.pentagon.mil/Awards/military_volunteer.aspx (last visited July 18, 2011).

39. Exec. Order No. 9277, 7 Fed. Reg. 10,125 (Dec. 3, 1942) (limiting award of the Purple Heart to those who have been "wounded in action against an enemy of the United States").

40. *Id.*; *see also* DEP'T OF THE NAVY, *supra* note 32, at 2-27 to -28.

41. Exec. Order No. 9277, 7 Fed. Reg. 10,125 (Dec. 5, 1942) (noting only requirement for Purple Heart is being "wounded in action against an enemy of the United States, or as a result of an act of such enemy, provided such wound necessitates treatment by a medical officer").

42. 10 U.S.C. § 6243 (2006); *see also* DEP'T OF THE NAVY, *supra* note 32, at 2-23.

43. Although "great responsibility" is not defined, the authority to award a Distinguished Service Medal is generally very restricted. *See, e.g.*, DEP'T OF THE NAVY, *supra* note 32, at 1-16 (reserving Distinguished Service Medal awarding authority to the Secretary of the Navy). Delegation of authority to confer lower awards is also constrained. *Id.* at 1-16 to -20.

44. Awarded for "exceptionally meritorious conduct in performing outstanding services." 10 U.S.C. § 1121 (2006); *see also* DEP'T OF THE NAVY, *supra* note 32, at 2-24.

45. Awarded for "outstanding meritorious achievement or service to the United States." Exec. Order No. 11,448, 35 Fed. Reg. 915 (Jan. 16, 1969); *see also* DEP'T OF THE NAVY, *supra* note 30, at 2-28.

46. *See, e.g.*, DEP'T OF THE NAVY, *supra* note 32, at 2-32 to -33 (establishing the criteria for the

Such awards have a powerful effect on public perception, reflected by the intense campaign waged by the Swift Boat Veterans for Truth during the 2004 presidential campaign.⁴⁷ The Swift Boat Veterans for Truth spent twenty-four million dollars⁴⁸ alleging that Democratic Presidential Candidate John Kerry had not earned his military awards.⁴⁹ The Swift Boat advertisements forced Kerry to defend the legitimacy of his military awards instead of simply letting him claim the symbolic power of his wartime decorations, which spoke to his performance in combat.⁵⁰ The symbolic power of military awards is not limited to presidential candidates. There are approximately twenty-two million veterans living in the United States,⁵¹ many of whom have earned various decorations throughout their service. Each veteran's decoration symbolizes a part of his or her character and history.

B. Individuals Rely upon Claims of Decorated Military Service

Military decorations are powerful symbols because individuals respond favorably to the symbol itself and frequently accord its claimant deference or respect. For example, wearing a military symbol such as the Purple Heart may enhance the credibility of a witness in a civil or criminal trial. In *United States v. Hinkson*,⁵² the government's case rested solely on the testimony of Elven Swisher, who claimed Hinkson solicited the murder of three federal officials.⁵³ While testifying, Swisher wore a Purple Heart medal on his lapel, an honor he claimed to have earned serving in the Korean War.⁵⁴ Hinkson's attorney noted that, given

Navy and Marine Corp Achievement medal as "sustained performance or specific achievement of a superlative nature").

47. See, e.g., Jodi Wilgoren, *Vietnam Veterans Buy Ads to Attack Kerry*, N.Y. TIMES, Aug. 5, 2004, at A16.

48. Matthew J. Allman, Note, *Swift Boat Captains of Industry for Truth: Citizens United and the Illogic of the Natural Person Theory of Corporate Personhood*, 38 FLA. ST. U. L. REV. 387, 388 (2011).

49. See, e.g., Wilgoren, *supra* note 47.

50. See, e.g., Lois Romano & Jim VandeHei, *Kerry Says Group Is a Front for Bush*, WASH. POST, Aug. 20, 2004, at A01 ("Kerry, who has made his military service a centerpiece of his candidacy, was forced to defend his war honors . . .").

51. Nat'l Ctr. for Veterans Analysis & Statistics, *Profile of Veterans: 2009*, DEP'T VETERANS AFF. 2-3 (Jan. 2011), http://www.va.gov/vetdata/docs/SpecialReports/Profile_of_Veterans_2009_FINAL.pdf.

52. 585 F.3d 1247 (9th Cir. 2009), *cert. denied*, 563 U.S. ___, 131 S. Ct. 2096 (2011). David Hinkson was accused of plotting to murder three federal officials: an Internal Revenue Service agent, an assistant U.S. attorney, and a federal district court judge. *Id.* at 1251.

53. *Id.* at 1251.

54. *Id.* at 1254.

Swisher's 1937 birthdate, he would have been between the ages of thirteen and sixteen at the time of the Korean War.⁵⁵ Upon further questioning, Swisher falsely stated that he participated in classified missions after the Korean War to free prisoners of war from North Korean camps.⁵⁶ Although the trial court received further evidence exposing Swisher's lies, it did not permit such evidence to go before the jury.⁵⁷ The jury convicted Hinkson based upon Swisher's testimony.⁵⁸

The trial court denied Hinkson's motion for a new trial, partly because the judge had stricken all of the false testimony regarding the Purple Heart.⁵⁹ The judge reasoned that because there was no evidence of Swisher's claimed military decorations in the record, the false claims could not have influenced the jury's decision.⁶⁰ However, Swisher's *wearing* of the Purple Heart decoration influenced the jurors' perception of his credibility.⁶¹ Ben Casey, one of the jurors, stated that Swisher's claims of decorated military service bolstered Swisher's credibility.⁶² Casey stated that he "relied upon the credibility of Mr. Swisher"⁶³ in casting his vote to convict Hinkson.⁶⁴ If Casey had known Swisher lied about his military record, he "would not have voted for a guilty verdict."⁶⁵ Casey is not the only juror who has been influenced by claims of decorated military service.⁶⁶

55. *Id.*

56. *Id.*

57. *Id.* at 1256. The judge ruled that the letter from the National Personnel Management Support Branch of the United States Marine Corps (showing Swisher was ineligible to wear any medals) was not authenticated per the Federal Rules of Evidence. *Id.* Further, the evidence would be confusing and, in any event, consisted of extrinsic evidence of a single incident of untruthfulness. *Id.*

58. *Id.* at 1257.

59. *Id.* at 1258.

60. *Id.*

61. Appellant's Reply Brief at app., *United States v. Hinkson*, 585 F.3d 1247 (9th Cir. 2009) (No. 05-30303) (Affidavit of Ben S. Casey).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *See, e.g., Cartwright v. Goodyear Tire & Rubber Co.*, 665 N.E.2d 365 (Ill. App. Ct. 1996). *Cartwright* was a products liability case concerning a failure of a truck tire. *Id.* at 367. The case hinged on whether the jury believed Cartwright's own testimony about the events or the defense expert whose theory of the accident was incompatible with Cartwright's testimony. *Id.* at 368–70. On the stand, Cartwright testified about his decorated military service, and the jury returned an eleven million dollar verdict in his favor. *Id.* After trial, evidence which cast serious doubt upon Cartwright's claims of decorated military service served as the factual basis for a successful appeal. *Id.* at 372.

The United States Supreme Court recognized the effect of decorated military service on public perceptions and behavior in *Porter v. McCollum*.⁶⁷ In *Porter*, the Court noted that “[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines”⁶⁸ At sentencing for aggravated murder, Porter’s defense counsel failed to introduce any evidence of Porter’s heroic service during the Korean War.⁶⁹ The Court found that this failure amounted to ineffective assistance of counsel.⁷⁰ Despite the notoriously difficult standard⁷¹ for proving ineffective assistance of counsel articulated in *Strickland v. Washington*,⁷² the Court vacated Porter’s death sentence and remanded for resentencing.⁷³ In so doing, the Court emphasized that military decorations are powerful symbols and that individuals rely upon claims of military awards to form judgments about the character of the wearer.⁷⁴

C. *The Government Can Take Steps to Prevent the Misappropriation of Its Symbols*

Government symbols permeate the public sphere, providing individuals with information about diverse products and services such as banks,⁷⁵ produce,⁷⁶ and automobile tires.⁷⁷ These symbols are very much

67. 558 U.S. ___, 130 S. Ct. 447 (2009) (per curiam). George Porter was convicted of aggravated murder and sentenced to death. *Id.* at 449.

68. *Id.* at 455.

69. *Id.* at 449.

70. *Id.* at 455–56.

71. See, e.g., Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1074 nn.16–17 (2009) (collecting articles regarding the high bar of the *Strickland* standard and about the low rate of reversal due to ineffective assistance of counsel).

72. 466 U.S. 668, 687–88 (1984) (“When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.”).

73. *Porter*, 130 S. Ct. at 456.

74. *Id.* at 455.

75. When a financial institution displays the Federal Deposit Insurance Corporation logo, it represents that the federal government will guarantee deposits at that institution up to \$250,000. 12 C.F.R. § 328.2 (2011) (regulating display of logo at insured institutions); 12 U.S.C. § 1821(a)(1)(E) (Supp. IV 2010) (setting the maximum deposit insurance amount at \$250,000).

76. Only foods produced according to certain guidelines may display the U.S. Department of Agriculture organic seal. 7 U.S.C. § 6501 (2006); 7 C.F.R. § 205.102 (2010) (restricting use of term “organic” to foods produced per USDA regulations).

77. The National Highway Traffic Safety Administration provides guidance for grading tires based upon the treadwear, traction, and temperature resistance of the tire. 49 C.F.R. § 575.104 (2010).

like a commercial trademark, signifying the quality of the financial institution, the nature of the foodstuffs produced, or, in the case of military decorations, the character and experience of the claimant.⁷⁸

Just as a trademark owner must take care to prevent infringement of a trademark,⁷⁹ the government must also take steps to protect its symbols. Otherwise, as with an infringed or abandoned trademark, the meaning of those symbols could be lost.⁸⁰ The federal government typically protects its symbols through a cease-and-desist letter, notifying the offending party that it is misappropriating a government symbol and directing the party to cease its misuse of the symbol.⁸¹ If the offending party does not respond to the letter, the federal government may seek injunctive relief or criminal penalties.⁸² Although there are few decisions on point,⁸³ courts have recognized the government's prerogative in enforcing its rights to control its own symbols and have enjoined the misuse of official government symbols protected by federal law.⁸⁴

The government may protect its symbols by proscribing their misappropriation, even where doing so impacts speech or expressive conduct. For example, in *Schacht v. United States*,⁸⁵ the U.S. Supreme Court stated that the proscription on unauthorized wearing of an army

78. The Seventh Circuit detailed how consumers use such symbols in the trademark context: "Trademarks help consumers to select goods. By identifying the source of the goods, they convey valuable information to consumers at lower costs." *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1429 (7th Cir. 1985). In the government context, it is not the source of the goods that is at issue but rather that the goods (or the individual) meet certain governmentally ordained criteria.

79. Failure to assert trademark rights can show evidence of abandonment or acquiescence. *See, e.g., Sweetheart Plastics, Inc. v. Detroit Forming, Inc.*, 743 F.2d 1039, 1046–47 (4th Cir. 1984).

80. *Id.* at 1047 ("[I]f, through failure to prosecute, a mark continually loses 'strength' and 'distinctiveness', it will eventually hemorrhage so much that it dies as a mark." (quoting 1 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 17:5, at 780 (2d ed. 1984))).

81. *See, e.g.,* Marc J. Goldstrom, *Possible Misleading Advertisement Regarding FDIC Coverage*, FED. DEPOSIT INS. CORP. (Jan. 22, 1999), <http://www.fdic.gov/regulations/laws/rules/4000-9970.html> (providing a sample letter to a generic offending firm, requesting changes to the firm's use of the phrase "FDIC insured").

82. *See, e.g.,* *United States v. U.S.I.A. Homes, Inc.*, 409 F. Supp. 483, 484 (E.D.N.Y. 1976) (seeking injunction enjoining home builder from using the company name "U.S.I.A."—an acronym also representing the U.S. Information Agency).

83. *E.g.,* *Smith v. Goguen*, 415 U.S. 566, 596 (1974) (Rehnquist, J., dissenting) (noting that statutes regulating government symbols, such as postage stamps, currency, military uniforms, and military medals, "though long on the books, have never been judicially construed or even challenged").

84. *U.S.I.A. Homes*, 409 F. Supp. at 486 ("[T]o take a name which must tend to create a false impression of a governmental association in the public mind . . . supports a plain inference that the name was chosen precisely for that misleading purpose and that the choice is fraudulent by its very nature.").

85. 398 U.S. 58 (1970).

uniform passed constitutional muster.⁸⁶ The Court observed that “[o]ur previous cases would seem to make it clear that 18 U.S.C. § 702, making it an offense to wear our military uniforms without authority is, standing alone, a valid statute on its face.”⁸⁷ Courts have also recognized the government’s ability to protect other governmental symbols by regulating speech, such as restricting the use of the symbols of the Olympic Games⁸⁸ or of the U.S. Forest Service.⁸⁹

The government has taken similar actions with regard to the misappropriation of military honors. Congress has proscribed the unauthorized wearing of military medals since 1923.⁹⁰ When Congress became aware of an enforcement gap with regards to verbal or written claims of honors,⁹¹ it enacted the SVA, reaffirming its commitment to protecting the symbolic nature of military decorations. Additionally, the government has taken steps to prosecute individuals who falsely claim receipt of military honors.⁹² Thus, the government has the ability—and perhaps the duty—to take steps to protect its symbols, and it has done so with regard to military decorations.

II. THE SVA’S PROHIBITION OF FALSE VERBAL AND WRITTEN CLAIMS OF MILITARY AWARDS IMPLICATES THE FIRST AMENDMENT

The government has long criminalized the unauthorized wearing of military medals⁹³ because of the award’s ability to symbolize

86. *Id.* at 61.

87. *Id.* (citing *United States v. O’Brien*, 391 U.S. 367 (1968)). However, the Court found that the exception for theatrical productions, conditioned upon the actor not bringing discredit to the armed forces, violated the First Amendment. *Id.* at 63; *see infra* notes 145–154 and accompanying text.

88. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 536–41 (1987) (holding that Congress could grant exclusive use of the word “Olympic” or symbols of the Olympic Games).

89. *LightHawk, the Envtl. Air Force v. Robertson*, 812 F. Supp. 1095, 1104 (W.D. Wash. 1993) (stating the government can likely regulate commercial uses of the Smokey the Bear image).

90. Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286.

91. *Stolen Valor Act of 2005*, Pub. L. No. 109-437, § 2, 120 Stat. 3266, 3266 (2006) (“Federal law enforcement officers have limited ability to prosecute fraudulent claims of receipt of military decorations and medals.”).

92. *See, e.g., Northwest Crackdown on Fake Veterans in “Operation Stolen Valor,”* U.S. ATT’Y’S OFF. W. DISTRICT WASH. (Sept. 21, 2007), <http://www.justice.gov/usao/waw/press/2007/sep/operationstolenvalor.html>.

93. *See, e.g.,* Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286 (“[T]he wearing, manufacture, or sale of [specific medals and badges] awarded by the War Department . . . is prohibited, except when authorized . . .”).

biographical details as well as personal character traits.⁹⁴ The SVA goes further by proscribing false verbal or written claims of military decorations.⁹⁵ Because the First Amendment prohibits Congress from making any law “abridging the freedom of speech,”⁹⁶ the SVA’s direct regulation of speech raises First Amendment concerns.⁹⁷ This section examines the First Amendment issues surrounding the SVA by analyzing the statute’s language, relevant First Amendment jurisprudence, and recent constitutional challenges to the Act.

A. Congress Enacted the SVA to Combat False Claims of Military Honors Not Addressed by Existing Law

In passing the SVA, Congress recognized that false claims of a particular military decoration can misappropriate the award’s symbolic nature even when the speaker does not wear the decoration.⁹⁸ While Congress has long proscribed unauthorized wearing of military medals,⁹⁹ false verbal or written claims of military awards were not prohibited before the enactment of the SVA. Thus, an individual could avoid liability for falsely claiming receipt of a military decoration as long as he or she did not physically wear the medal.¹⁰⁰ In 1995, for example, Kane County, Illinois, Judge Michael O’Brien purchased replicas of two Medals of Honor, engraved his name on them, and printed pamphlets describing fictitious acts supporting his claim to the medals.¹⁰¹ After his falsehood was discovered, O’Brien received a censure from the Illinois Courts Commission.¹⁰² However, because federal law at the time only prohibited the unauthorized wearing, manufacturing, or selling of

94. *See supra* Part I.A.

95. Stolen Valor Act § 3.

96. U.S. CONST. amend. I.

97. *See, e.g.*, *United States v. Alvarez*, 617 F.3d 1198, 1217 (9th Cir. 2010) (holding the SVA facially unconstitutional as an impermissible direct regulation of speech), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 11-210); *United States v. Kepler*, No. 4:11-cr-00017-JAJ, slip op. at 9–10 (S.D. Iowa May 31, 2011) (invalidating the SVA on overbreadth grounds), *appeal docketed*, No. 11-2278 (8th Cir. June 10, 2011); *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1192 (D. Colo. 2010) (holding the SVA facially unconstitutional as a content-based restriction on speech), *argued*, No. 10-1358 (10th Cir. May 12, 2011).

98. Stolen Valor Act § 2.

99. Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286.

100. 18 U.S.C. § 704(a) (2000) (criminalizing only the wearing of military decorations), *amended by* 18 U.S.C. § 704(a)–(b) (2006).

101. Linda Young, *Medal Lie Is Judge’s Downfall*, CHI. TRIB., Sept. 24, 1995, § 4 (MetroDuPage), at 1.

102. *Id.*

military decorations,¹⁰³ Mr. O'Brien never faced federal charges because he did not wear the replica medals.¹⁰⁴

Advocating for passage of the SVA, Senator Kent Conrad explained on the Senate floor that existing law did “not apply to individuals who claim to be award recipients either verbally or in writing, or to those who display fake medals in their offices or homes.”¹⁰⁵ Congress enacted the SVA to address this enforceability gap and enable prosecution of those who falsely claim military honors without actually wearing the medals.¹⁰⁶

B. The SVA Directly Regulates Speech, Implicating the First Amendment

The SVA provides criminal penalties for anyone who “falsely represents . . . verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States”¹⁰⁷ The SVA thus regulates speech by prohibiting individuals from speaking or writing about military decorations they have not earned,¹⁰⁸ raising several First Amendment concerns.¹⁰⁹ Analyzing these First Amendment concerns is a multi-step process. The first step is to determine whether the statute regulates speech based upon its content.¹¹⁰ The next step is to ascertain whether the proscribed speech falls into a category of speech “the prevention and punishment of which have never been thought to raise any Constitutional problem.”¹¹¹ Finally, one must examine the regulation to ensure it is not impermissibly vague¹¹² and does not discriminate based on the viewpoint of the speaker.¹¹³

103. 18 U.S.C. § 704(a) (criminalizing only the wearing of military decorations), *amended by* 18 U.S.C. § 704(a)–(b).

104. Young, *supra* note 101.

105. 151 CONG. REC. S12,688 (daily ed. Nov. 10, 2005) (statement of Sen. Conrad).

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

107. 18 U.S.C. § 704(b).

108. *United States v. Alvarez*, 617 F.3d 1198, 1202 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 11-210).

109. *Id.*

110. *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1053 (3d Cir. 1994) (“[T]he first step in First Amendment analysis has been to determine whether a statute is content-neutral or content-based.”).

111. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

112. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) (holding a statute void for vagueness under a First Amendment analysis because of its chilling effect on protected speech).

113. *See, e.g., Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“[T]he First Amendment forbids the government to regulate speech in ways that favor some

A content-based statute regulates speech because of its subject matter. For example, a law prohibiting obscene pornographic phone recordings qualifies as content based.¹¹⁴ Conversely, a government regulation that prohibits anyone from playing any sound above a certain decibel level is content neutral.¹¹⁵ Content-based regulations are normally presumed invalid because such regulation “raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.”¹¹⁶ As the Court declared in *Police Department of Chicago v. Mosley*,¹¹⁷ “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹¹⁸ In order to pass constitutional muster, a content-based regulation must satisfy the strict scrutiny standard, which requires the government to “specifically identify an ‘actual problem’ in need of solving”¹¹⁹ and show that “the curtailment of free speech [is] actually necessary to the solution.”¹²⁰ Consequently, few laws restricting the content of speech survive strict scrutiny.¹²¹

However, there are several classes of speech “the prevention and punishment of which has never been thought to raise any Constitutional problem.”¹²² The government may regulate speech that falls within one of these classes without meeting the rigors of strict scrutiny.¹²³ In *United States v. Stevens*, the U.S. Supreme Court held that these “well-defined and narrowly limited classes”¹²⁴ include speech integral to criminal conduct,¹²⁵ obscenity,¹²⁶ defamation,¹²⁷ incitement,¹²⁸ and fraud.¹²⁹

viewpoints or ideas at the expense of others.”).

114. *See, e.g., Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 124 (1989) (denying First Amendment protection to pre-recorded phone messages based on the messages’ obscene content).

115. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989).

116. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

117. 408 U.S. 92 (1972).

118. *Id.* at 95.

119. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. ___, 131 S. Ct. 2729, 2738 (2011) (citing *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818, 822–23 (2000)).

120. *Id.* at 2738 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992)).

121. *Playboy*, 529 U.S. at 818 (“It is rare that a regulation restricting speech because of its content will ever be permissible.”).

122. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942), *quoted in United States v. Stevens*, 559 U.S. ___, 130 S. Ct. 1577, 1584 (2010).

123. *Chaplinsky*, 315 U.S. at 571–72.

124. *Stevens*, 130 S. Ct. at 1584 (citing *Chaplinsky*, 315 U.S. at 571).

125. Speech integral to criminal conduct addresses criminal conduct beyond the speech itself. It is “intrinsicly related” to another crime, creating a “proximate link” from the speech to the

Although the Court suggested that its list of unprotected classes of speech was not finite,¹³⁰ it set a high bar for discerning additional categories.¹³¹ The following Term in *Brown v. Entertainment Merchants Ass'n*,¹³² the Court resisted attempts to either create new categories or expand the scope of existing ones.¹³³ Further, it reinforced the “categorical” approach articulated in *Stevens*.¹³⁴ Moreover, even if the speech falls into one of the *Stevens* categories, government regulation of that speech must conform to other First Amendment mandates.¹³⁵ Specifically, the statute must not chill protected speech¹³⁶ or discriminate based upon the viewpoint of the speaker.¹³⁷

A statute chills protected speech if it encourages individuals to self-censor their lawful speech for fear of criminal prosecution. For example, in *Reno v. American Civil Liberties Union*,¹³⁸ the Court invalidated a federal statute that prohibited transmission of “indecent” or “patently

underlying crime. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249–51 (2002).

126. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. ___, 131 S. Ct. 2729, 2734 (2011) (limiting obscenity to sexually based materials).

127. Defamation is a “false written or oral statement that damages another’s reputation.” BLACK’S LAW DICTIONARY 479 (9th ed. 2009).

128. Incitement is speech that tends to provoke “an immediate breach of the peace.” *Chaplinsky*, 315 U.S. at 572.

129. *Stevens*, 130 S. Ct. at 1584. The Court did not list “false statements” as a stand-alone category, despite earlier opinions holding that false statements of fact were unprotected. *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless”); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 n.22 (1984); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact.”).

130. *Stevens*, 130 S. Ct. at 1584–86.

131. *Id.* at 1586 (“Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”).

132. 564 U.S. ___, 131 S. Ct. 2729 (2011).

133. *Id.* at 2734.

134. *Id.* at 2733.

135. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) (“[T]hese areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.” (emphasis in original)).

136. *See, e.g.*, *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991) (invalidating statute on vagueness grounds because the speaker must guess the “contours” of the statute defining protected from unprotected speech).

137. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”).

138. 521 U.S. 844 (1997).

offensive” messages to minors¹³⁹ without defining the terms in the statute.¹⁴⁰ The Court noted that “the many ambiguities concerning [the statute’s] scope . . . render it problematic for purposes of the First Amendment,”¹⁴¹ because the statute’s vagueness, coupled with its criminal sanctions, “may well cause speakers to remain silent rather than communicate.”¹⁴² Likewise, statutes prohibiting false statements about historical events or scientific theories have a significant capacity to deter otherwise “constitutionally valuable” speech because the actual truth may be uncertain, or resolvable only through a highly politicized process such as a public trial.¹⁴³ In that case, a court would strike down a statute not for its *direct* regulation of speech, but for its capacity to encourage self-censorship.¹⁴⁴

Just as the government may not proscribe speech ambiguously, it may not regulate speech based upon the viewpoint of the speaker.¹⁴⁵ For example, in *Schacht v. United States*, the Court stated that a federal law¹⁴⁶ prohibiting the unauthorized wearing of a military uniform “is, standing alone, a valid statute on its face”¹⁴⁷ but struck down another statute that permitted wearing military uniforms in theatrical productions so long as the production did not discredit the military.¹⁴⁸ The Court noted that “Schacht was free to participate in any skit at the demonstration that praised the Army, but . . . could be convicted of a federal offense if his portrayal attacked the Army instead of praising it.”¹⁴⁹ This constituted an impermissible restriction on the expression of anti-military viewpoints.¹⁵⁰ While a blanket prohibition on wearing a

139. *Id.* at 859–60.

140. *Id.* at 871.

141. *Id.* at 870.

142. *Id.* at 872.

143. Eugene Volokh, *Amicus Curiae Brief: Boundaries of the First Amendment’s “False Statements of Fact” Exception*, 6 STAN. J. C.R. & C.L. 343, 351–52 (2010).

144. *Id.*

145. Viewpoint discrimination is a “subset of content discrimination,” regulating speech based upon “agreement or disagreement with the particular position the speaker wishes to express.” SMOLLA, *supra* note 6, § 3:9, at 3-12.8. Thus, viewpoint discrimination is an “especially egregious form of content discrimination in which the government targets not just subject matter, but the particular views taken on subjects by speakers.” *Id.* at 3-12.9.

146. 18 U.S.C. § 702 (2006).

147. *Schacht v. United States*, 398 U.S. 58, 61 (1970) (citing *United States v. O’Brien*, 391 U.S. 367 (1968)).

148. *Id.* at 62–63 (striking down the requirement that actors must not bring discredit upon the armed forces to be authorized to wear a military uniform).

149. *Id.* at 63.

150. *Id.*

military uniform without authorization is permissible, a companion regulation that permits wearing of a uniform depending on the *viewpoint* of the wearer is unconstitutional.¹⁵¹

Likewise, in *LightHawk, the Environmental Air Force v. Robertson*,¹⁵² the district court recognized the government's significant property interest in the image of Smokey the Bear, yet struck down U.S. Forest Service regulations prohibiting non-commercial use of Smokey's image that did not promote forest fire prevention.¹⁵³ The court found the Forest Service's restrictions to be an impermissible restriction on the viewpoint of the message.¹⁵⁴ As in *Schacht*, the court held that the government's conditioning the use of its symbol based upon *how* the symbol is employed constitutes unconstitutional viewpoint regulation.¹⁵⁵

In sum, if the government seeks to regulate the subject matter of speech, it must satisfy strict scrutiny unless the speech falls into one of the "historic and traditional categories [of unprotected speech] long familiar to the bar" articulated in *Stevens*.¹⁵⁶ However, even if the government seeks to regulate one of these categories of unprotected speech, it still may not regulate in a manner that chills protected speech, nor may it discriminate based upon the viewpoint of the speaker.

C. *The First Amendment Does Not Protect Fraudulent Speech*

Fraud is one of the categories of proscribable speech recognized in *Stevens*.¹⁵⁷ However, *Stevens* did not define fraud.¹⁵⁸ In fact, fraud lacks a consistent definition.¹⁵⁹ This is partly because fraud is both a civil and

151. *Id.*

152. 812 F. Supp. 1095 (W.D. Wash. 1993).

153. *Id.* at 1102–03.

154. *Id.* at 1103.

155. *Id.* at 1102.

156. *United States v. Stevens*, 559 U.S. ___, 130 S. Ct. 1577, 1584 (2010) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)).

157. *Id.*

158. *Id.*

159. *See, e.g.*, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 112 (2006), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf>. This report defines fraud as including "violations of statutes pertaining to lending and credit institutions, the Postal Service, interstate wire, radio, television, computer, credit card, veterans benefits, allotments, bankruptcy, marketing agreements, commodity credit, the Securities and Exchange Commission, railroad retirement, unemployment, Social Security, food stamp, false personation, citizenship, passports, conspiracy, and claims and statements . . ." *Id.*

a criminal offense.¹⁶⁰ Additionally, fraudulent conduct or intent is an element of many other criminal offenses.¹⁶¹ Some judges think that fraud “needs no definition [as] it is as old as falsehood and as versable as human ingenuity,”¹⁶² yet a precise definition of fraud is essential in determining the scope of the fraud exception to the First Amendment identified in *Stevens*.

The Supreme Court clarified the boundaries of the fraud exception to First Amendment protection in *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*¹⁶³ In *Madigan*, the Illinois Attorney General sued telephone solicitors working on behalf of a veterans’ charity for fraudulent statements regarding the amount of money actually making its way to the charity instead of being retained by the solicitors.¹⁶⁴ The Court differentiated between charitable solicitations, which are protected by the First Amendment,¹⁶⁵ and fraudulent transactions, which are not.¹⁶⁶

To distinguish between the two classes of speech, the Court identified several traits of a “properly tailored fraud action.”¹⁶⁷ First, the state must prove that the defendant made a materially false statement and had knowledge of its falsity.¹⁶⁸ Additionally, the state must prove the statements were made “with the intent to mislead the listener, and succeeded in doing so.”¹⁶⁹ The Court did not articulate a harm element, merely requiring that the fraudster intentionally and successfully mislead

160. Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 736–37 (1999).

161. *Id.* at 731. Fraud can serve as the core criminal conduct, such as in wire fraud. *Id.* at 731 n.12 (citing 18 U.S.C. § 1343 (1994)). Additionally, certain conduct can be criminalized if it is done “fraudulently.” *Id.* at 731 n.14 (citing 18 U.S.C. § 917 (1994) (criminalizing fraudulent misrepresentations as Red Cross agent)). Finally, other statutes prohibit conduct when there is intent to defraud or the conduct is part of a “scheme or artifice to defraud.” *Id.* at 732 nn.17–18 (citing 18 U.S.C. § 916 (1994) (prohibiting impersonation of 4-H club member with an “intent to defraud”) and 18 U.S.C. § 1341 (1994) (criminalizing mailing in furtherance of a “scheme or artifice to defraud”)).

162. *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941), *quoted in* Podgor, *supra* note 160, at 739.

163. 538 U.S. 600 (2003).

164. *Id.* at 605–06.

165. *Id.* at 611–12.

166. *Id.* at 612 (“[T]he First Amendment does not shield fraud.”).

167. *Id.* at 620. Although *Madigan* addressed an Illinois statute, the Court indicated the Illinois statute was restating the elements of a “properly tailored” fraud action. *Id.*

168. *Id.* Although the *Madigan* Court did not define “materiality,” other Supreme Court decisions have defined “materiality” in the context of false statements. *See, e.g., United States v. Gaudin*, 515 U.S. 506, 509 (1995) (“The statement must have ‘a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed.’” (alteration in original) (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988))).

169. *Madigan*, 538 U.S. at 620.

the listener.¹⁷⁰ Thus, the Court defined a “properly tailored fraud action” as one that proscribes an intentional and material false statement, intended to mislead the victim, which in fact succeeds in doing so.¹⁷¹ Accordingly, a content-based regulation will pass constitutional muster under the fraud exception *only* if it contains each of these elements as a predicate to liability.¹⁷²

D. Courts Are Split on Whether the SVA Impermissibly Restricts Speech

Federal courts have addressed four First Amendment challenges to the SVA.¹⁷³ In three cases, *United States v. Alvarez*,¹⁷⁴ *United States v. Strandlof*,¹⁷⁵ and *United States v. Kepler*,¹⁷⁶ the constitutional challenges succeeded. In another, *United States v. Robbins*,¹⁷⁷ the court held that the speech regulated by the SVA falls outside the ambit of the First Amendment.¹⁷⁸

170. *Id.* However, *Madigan* involved fraudulent charitable contributions, wherein the misled listener may be induced to contribute funds to a charity. *Id.* at 605. Therefore, some form of injury may also be required. *In re Witt*, 583 N.E.2d 526, 531 (Ill. 1991) (listing damages as an element of fraud), *construed in Madigan*, 538 U.S. at 620.

171. *Madigan*, 538 U.S. at 620.

172. *See* 281 Care Comm. v. Arneson, 638 F.3d 621, 634 n.2 (8th Cir. 2011) (“To the extent that defendants also argue in favor of application of fraud principles to all knowingly false speech, we reject the argument, noting the Supreme Court has carefully limited the boundaries of what is considered fraudulent speech.”).

173. In addition to the four cases discussed here, another case is pending in the Eleventh Circuit. Gary Amster was convicted of a violation of the SVA. *United States v. Amster*, No. 8:09-cr-263-T26TGW, slip op. at 1 (M.D. Fla. Feb. 18, 2010), *appeal docketed*, No. 10-12139 (11th Cir. May 11, 2010). He raised a First Amendment challenge only in a post-trial motion for acquittal, merely asserting in a single paragraph (without citations) that the SVA violated the First Amendment. Motion for Judgment of Acquittal at 4, *Amster*, No. 8:09-cr-263-T26TGW (Feb. 17, 2010). The district court dismissed the First Amendment challenge in a single sentence. *Amster*, slip op. at 1 (Feb. 18, 2010). Amster filed an appeal with the Eleventh Circuit; however, the appeal has been stayed pending the Supreme Court’s decision in *Alvarez*. *United States v. Amster*, No. 10-12139 (11th Cir. docketed May 11, 2010).

174. 617 F.3d 1198 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 11-210).

175. 746 F. Supp. 2d 1183 (D. Colo. 2010), *argued*, No. 10-1358 (10th Cir. May 12, 2011).

176. No. 4:11-cr-00017-JAJ (S.D. Iowa May 31, 2011), *appeal docketed*, No. 11-2278 (8th Cir. June 10, 2011).

177. 759 F. Supp. 2d 815 (W.D. Va. 2011), *appeal docketed*, No. 11-4757 (4th Cir. July 29, 2011).

178. *Id.* at 817.

1. *The Ninth Circuit Held that the First Amendment Protects Most False Speech, Including False Claims of Military Decorations*

Xavier Alvarez introduced himself during his inaugural speech to the Three Valleys Municipal Water District board by stating, “I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I’m still around.”¹⁷⁹ However, Alvarez never received the Medal of Honor, was never in combat, and never served in the Marines or in any other branch of the armed forces.¹⁸⁰ Other than the self-evident statement, “I’m still around,” Alvarez’s introduction was “a series of bizarre lies.”¹⁸¹ After the FBI received a recording of the Water Board proceedings, the government indicted Alvarez on two counts of violating the SVA.¹⁸² The district court denied Alvarez’s motion to dismiss the charges based upon the alleged unconstitutionality of the SVA.¹⁸³ Alvarez then pleaded guilty but preserved his constitutional challenge.¹⁸⁴

Alvarez’s constitutional challenge fared better with the Ninth Circuit.¹⁸⁵ The court declared the SVA’s proscriptions on false claims facially unconstitutional.¹⁸⁶ In doing so, the court looked to *Stevens* for the exclusive list of exceptions to First Amendment protections.¹⁸⁷ The majority considered whether the speech prohibited by the SVA could fit into one of the *Stevens* categories, including fraud.¹⁸⁸ In considering whether the SVA qualifies as an anti-fraud measure, the majority declared that fraud statutes “must be precisely crafted to target only specific false statements that are *likely to cause a bona fide harm*.”¹⁸⁹ The majority found that because the SVA did not require the

179. *Alvarez*, 617 F.3d at 1200 (internal quotation marks omitted).

180. *Id.* at 1200–01.

181. *Id.* at 1201.

182. *Id.* Alvarez was charged with violating the proscription against false verbal claims. *Id.* (citing 18 U.S.C. § 704(b) (2006)). His sentence was enhanced to one year because he claimed to have received the Congressional Medal of Honor. *Id.* at 1202 (citing 18 U.S.C. § 704(c)).

183. *Id.*

184. *Id.*

185. *Id.* at 1218.

186. *Id.*

187. *Id.* at 1202 (“[H]istoric and traditional categories . . . includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.” (quoting *United States v. Stevens*, 559 U.S. ___, 130 S. Ct. 1577, 1584 (2010))) (internal quotation marks omitted).

188. *Id.* at 1205–12.

189. *Id.* at 1211 (emphasis added).

government to prove detrimental reliance (or a bona fide harm), the SVA could not be construed as an anti-fraud measure.¹⁹⁰ The majority also rejected the notion that the SVA passed constitutional muster under the other *Stevens* exceptions, specifically addressing the exceptions for statutes prohibiting defamation¹⁹¹ and speech integral to criminal conduct.¹⁹² Because the conduct proscribed by the SVA did not fall within the *Stevens* exceptions, it was subject to strict scrutiny,¹⁹³ which the majority and dissent agreed the SVA could not survive.¹⁹⁴

However, the dissent, relying upon the U.S. Supreme Court's pronouncement in *Gertz v. Robert Welch, Inc.*,¹⁹⁵ declared that nearly all false speech is unprotected.¹⁹⁶ The dissent agreed with the majority that "speech that matters," such as statements about public officials,¹⁹⁷ rhetorical hyperbole, and fiction¹⁹⁸ must be protected even when not factually accurate.¹⁹⁹ Yet, the dissent argued that the remainder of false speech may be freely regulated solely due to its falsity, rejecting the majority's expansive reading of the First Amendment.²⁰⁰

The disagreement between the majority and the dissent centered on the extent of protection the First Amendment affords false speech. The majority hewed closely to *Stevens*' categories of unprotected speech (and did not find knowing falsehoods among those categories),²⁰¹ while the dissent declared that falsehoods generally lack any constitutional

190. *Id.* at 1212.

191. *Id.* at 1209–11.

192. *Id.* at 1212–13.

193. *Id.* at 1215. The court rejected the notion that Congress may proscribe false speech simply because "[f]alse statements of fact are particularly valueless." *Id.* at 1203 (alteration in original) (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988)).

194. *Id.* at 1215–18; *id.* at 1232 n.10 (Bybee, J., dissenting).

195. 418 U.S. 323 (1974). The *Gertz* Court held that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Id.* at 340 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). However, *Gertz* was a defamation case between two private individuals, and *Gertz*'s pronouncement on the constitutional value of false speech is potentially overbroad. *Nike, Inc. v. Kasky*, 539 U.S. 654, 664 (2003) (Stevens, J., concurring in dismissal of writ as improvidently granted).

196. *Alvarez*, 617 F.3d at 1222 (Bybee, J., dissenting).

197. *Id.* at 1221 (citing *Sullivan*, 376 U.S. at 269–72).

198. *Id.* at 1222 (citing *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970)).

199. *Id.* at 1222–23.

200. *Id.* at 1219, 1231.

201. *Id.* at 1214 (majority opinion) ("[F]alse factual speech as a general category is not, and cannot be, proscribed under threat of criminal prosecution."). See *supra* notes 121–133 and accompanying text for discussion of the *Stevens* exemptions.

value.²⁰² The U.S. Supreme Court granted certiorari on October 17, 2011.²⁰³

2. *Applying the Reasoning of Alvarez, the District of Colorado Held that the SVA Violates the First Amendment*

While forming a veterans' advocacy group in Denver, Rick Strandlof allegedly posed as a former captain in the Marine Corps who had medically retired due to wounds sustained in Iraq.²⁰⁴ Strandlof also allegedly claimed receipt of a Purple Heart.²⁰⁵ However, Strandlof never saw combat, never served in the military, nor received the Purple Heart.²⁰⁶ Strandlof was charged with violating the SVA.²⁰⁷ The U.S. District Court for the District of Colorado, echoing the *Alvarez* reasoning, dismissed the charge on the ground that the SVA's speech proscriptions facially violate the First Amendment.²⁰⁸ Although the government had not defended the SVA as an anti-fraud measure, the district court considered whether the statute may fall within the First Amendment's exception for fraudulent speech.²⁰⁹ The court observed that while the statute's sponsors might have intended the SVA to combat fraud,²¹⁰ the statutory text does not require any showing of harm to or reliance by the alleged victim.²¹¹ The court held that this disqualifies the SVA from being an anti-fraud statute.²¹² The government appealed and the case was argued before the Tenth Circuit on May 12, 2011.²¹³

3. *The Southern District of Iowa Held that the SVA Is Unconstitutionally Broad*

Jeffrey Kepler served in the United States Army for twenty-eight

202. *Id.* at 1222–23 (Bybee, J., dissenting).

203. 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011).

204. Complaint at 3, *United States v. Strandlof*, 746 F. Supp. 2d 1183 (D. Colo. 2010) (No. 1:09-cr-00497-REB), 2009 WL 6825857, *argued*, No. 10-1358 (10th Cir. May 12, 2011).

205. *Id.*

206. *Id.* at 2–3.

207. *Strandlof*, 746 F. Supp. 2d at 1185.

208. *Id.* at 1192.

209. *Id.* at 1187–88.

210. *Id.* at 1188.

211. 18 U.S.C. § 704(b) (2006) (requiring only a “false representation” on the part of the speaker).

212. *Strandlof*, 746 F. Supp. 2d at 1188.

213. *United States v. Strandlof*, No. 10-1358 (10th Cir. argued May 12, 2011). As of the time of this Comment's publication, the Tenth Circuit's decision is still pending.

days, after which he was discharged for medical reasons.²¹⁴ Although he had only been in the service a short time (and thus could not qualify for veteran's benefits), Kepler allegedly applied to the Department of Veterans Affairs for benefits using a forged discharge certificate.²¹⁵ Kepler allegedly claimed he was awarded the Silver Star, two Bronze Stars, and a Purple Heart.²¹⁶ Although the district court cited the *Alvarez* decision approvingly,²¹⁷ it could not entirely adopt *Alvarez's* reasoning; Kepler's speech, unlike Xavier Alvarez's boasting, was arguably fraudulent because it was used to obtain governmental benefits to which Kepler was not entitled.²¹⁸ Nonetheless, the district court found the SVA facially unconstitutional²¹⁹ on the ground that it unambiguously applies to *all* false representations, regardless of the speaker's intent.²²⁰ In doing so, the court held that the SVA criminalizes swaths of protected speech and is therefore unconstitutionally overbroad.²²¹ While the court discussed fraud, it declined to construe the SVA as an anti-fraud measure because, as noted in *Alvarez*²²² and *Strandlof*,²²³ the statute does not require actual reliance.²²⁴ The government's appeal is pending before the Eighth Circuit; however, the appeal has been stayed pending the U.S. Supreme Court's decision in *Alvarez*.²²⁵

4. *The Western District of Virginia Held that the SVA Does Not Reach "Speech that Matters"*

Ronnie L. Robbins made several public statements regarding his military service during the course of his campaign for Commissioner of

214. Government's Response to Motion to Dismiss at 3–4, *United States v. Kepler*, No. 4:11-cr-00017-JAJ (S.D. Iowa Apr. 20, 2011), *appeal docketed*, No. 11-2278 (8th Cir. June 10, 2011).

215. *Id.* at 4.

216. *Id.*

217. *United States v. Kepler*, No. 4:11-cr-00017-JAJ, slip op. at 8–9 (S.D. Iowa May 31, 2011).

218. *Id.* at 9 (“[T]he Court notes that Defendant’s actual speech in this case is not necessarily protected by the First Amendment. . . . [F]raudulent speech exists beyond the aegis of First Amendment protection.”).

219. *Id.* at 9–10.

220. *Id.* at 4.

221. *Id.* at 4, 9–10.

222. *United States v. Alvarez*, 617 F.3d 1198, 1212 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 11-210).

223. *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1188 (D. Colo. 2010), *argued*, No. 10-1358 (10th Cir. May 12, 2011).

224. *Kepler*, slip op. at 4 n.1.

225. *United States v. Kepler*, No. 11-2278 (8th Cir. docketed June 10, 2011).

Revenue of Dickenson County, Virginia.²²⁶ In his campaign material, Robbins claimed that he was a Vietnam veteran and received the Vietnam Campaign Medal and Vietnam Service Medal.²²⁷ Although Robbins did, in fact, serve in the Army, he never served overseas and never earned either medal.²²⁸ When indicted under the SVA, Robbins moved to quash the indictment on the same First Amendment grounds that succeeded in *Alvarez* and *Strandlof*.²²⁹ However, the district court rejected this argument,²³⁰ relying instead upon the U.S. Supreme Court's pronouncement in *Gertz v. Robert Welch, Inc.* that false statements are generally not protected by the First Amendment unless they qualify as "speech that matters."²³¹

The district court examined several ways that false speech may qualify as "speech that matters."²³² First, the district court noted that some false speech is protected to prevent a chilling effect on otherwise protected speech.²³³ Second, the court held that some falsehoods help identify truthful statements²³⁴ because even false statements "bring[] about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"²³⁵ Finally, the court noted that some falsehoods must be protected because "if the dominant forces in government were able to police truth and falsity, partisanship could pervade the protection of speech."²³⁶ The district court examined Robbins' false speech and found that because Robbins uttered objectively verifiable facts about himself, the restriction did not chill otherwise protected speech.²³⁷ For the same reason, the speech did not

226. Superseding Indictment at 2, *United States v. Robbins*, 759 F. Supp. 2d 815 (W.D. Va. 2011) (No. 2:10-cr-00006), *appeal docketed*, No. 11-4757 (4th Cir. July 29, 2011).

227. *Id.*

228. *Id.* at 1, 7.

229. Memorandum in Support of Motion to Quash Indictment at 3, 6, *Robbins*, 759 F. Supp. 2d 815 (No. 2:10-cr-00006) (citing *Alvarez* and *Strandlof* to support the argument that the SVA is a content-based regulation of speech).

230. *Robbins*, 759 F. Supp. 2d at 818 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

231. 418 U.S. at 340–41 (describing the news media as an example of "speech that matters").

232. *Robbins*, 759 F. Supp. 2d at 819–20.

233. *Id.* at 820; *see also supra* notes 138–144 and accompanying text.

234. *Id.* at 820.

235. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) (quoting JOHN STUART MILL, ON LIBERTY 15 (Ronald Buchanan McCallum ed., Basil Blackwell 1947) (1859)), *cited with approval in Robbins*, 759 F. Supp. 2d at 820.

236. *Robbins*, 759 F. Supp. 2d at 820.

237. *Id.*

serve to clarify the truth.²³⁸ Finally, the court held that because the SVA targeted false factual speech, it could not serve as a vehicle for censorship by the political majority.²³⁹ Thus, the court concluded that the SVA does not proscribe “speech that matters,” and therefore does not proscribe false speech protected by the First Amendment.²⁴⁰ The court denied Robbins’ motion to quash the indictment, and a jury convicted him of violating the SVA on March 2, 2011.²⁴¹ For his false claims of military decorations, the court sentenced Robbins to six months imprisonment.²⁴² Robbins’ appeal is currently pending before the Fourth Circuit.²⁴³

The federal courts have thus split on the SVA’s constitutionality. Some, such as the majority in *Alvarez*²⁴⁴ and the district court in *Strandlof*,²⁴⁵ held that because the SVA did not fall into one of the categories of unprotected speech,²⁴⁶ the SVA must satisfy strict scrutiny. Both courts found the SVA did not meet that demanding standard.²⁴⁷ Others, such as the dissent in *Alvarez*²⁴⁸ and the district court in *Robbins*²⁴⁹ pointed to other U.S. Supreme Court precedent, which states that false speech does not enjoy constitutional protection unless it qualifies as “speech that matters.”²⁵⁰ One court limited its discussion of the scope of protection for false statements to dictum, ultimately invalidating the SVA on overbreadth grounds.²⁵¹ The three courts that struck down the SVA attempted to construe the SVA as an anti-fraud

238. *Id.*

239. *Id.* at 820–21.

240. *Id.* at 819.

241. Verdict, *Robbins*, 759 F. Supp. 2d 815 (No. 2:10-cr-00006).

242. Amended Judgment at 1, 3, *Robbins*, 759 F. Supp. 2d 815 (No. 2:10-cr-00006).

243. *United States v. Robbins*, No. 11-4757 (4th Cir. docketed July 29, 2011).

244. *United States v. Alvarez*, 617 F.3d 1198, 1215 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 11-210).

245. *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1189 (D. Colo. 2010), *argued*, No. 10-1358 (10th Cir. May 12, 2011).

246. *United States v. Stevens*, 559 U.S. ___, 130 S. Ct. 1577, 1584 (2010); *see supra* notes 122–135 and accompanying text (discussing categories of proscribable speech).

247. *Alvarez*, 617 F.3d at 1218; *Strandlof*, 746 F. Supp. 2d at 1189–92.

248. *Alvarez*, 617 F.3d at 1222–23 (Bybee, J., dissenting).

249. *United States v. Robbins*, 759 F. Supp. 2d 815, 817–18 (W.D. Va. 2011), *appeal docketed*, No. 11-4757 (4th Cir. July 29, 2011).

250. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact.”); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 n.22 (1984).

251. *United States v. Kepler*, No. 4:11-cr-00017-JAJ, slip op. at 5–7, 9–10 (S.D. Iowa May 31, 2011), *appeal docketed*, No. 11-2278 (8th Cir. June 10, 2011).

measure, but all three, citing *Madigan*, found the absence of a requirement for actual reliance fatal to this argument.²⁵²

III. FRAUD DOES NOT REQUIRE A PECUNIARY HARM

Madigan's definition of fraud requires that the listener be misled by the false statement but does not require that the listener suffer a pecuniary harm.²⁵³ Likewise, certain statutory definitions of fraud do not require pecuniary harm. One example is the offense of false personation, which is the "crime of falsely representing oneself as another person . . . for the purpose of deceiving someone."²⁵⁴ An individual may commit the crime of false personation by impersonating a law enforcement officer,²⁵⁵ or, as this Comment will argue, by impersonating a decorated military veteran. Most jurisdictions, as well as the U.S. Department of Justice, categorize the crime of false personation as a subset of fraud.²⁵⁶ Further, states usually codify false personation statutes in the same section as other fraud statutes.²⁵⁷

Unlike other types of fraud,²⁵⁸ false personation does not require a financial injury.²⁵⁹ In fact, the definition of injury in false personation cases is fairly broad: the societal harm begins when the fraudster assumes the false identity,²⁶⁰ and is complete when the deceived person

252. *Alvarez*, 617 F.3d at 1212; *Kepler*, slip op. at 4 n.1; *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1188 (D. Colo. 2010), *argued*, No. 10-1358 (10th Cir. May 12, 2011).

253. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003).

254. BLACK'S LAW DICTIONARY 822 (9th ed. 2009).

255. *See, e.g.*, *United States v. Robbins*, 613 F.2d 688, 692 (8th Cir. 1979) (affirming a conviction for impersonating a federal law enforcement agent).

256. U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, *supra* note 159.

257. *See, e.g.*, False Personation, 720 ILL. COMP. STAT. ANN. 5/17-2 (West Supp. 2011) (criminalizing claiming veteran's status when seeking employment as subset of "Deception and Fraud"); Improper Use of an Insignia, NEV. REV. STAT. § 205.410 (2009) (criminalizing the use of a veteran's organization badge to obtain a benefit, listed under "Fraud and False Personation"); Criminal Impersonation in the Second Degree, N.Y. PENAL LAW § 190.25 (McKinney 2010) (criminalizing representation of membership in an organization to obtain a benefit, listed under "Offenses Involving Fraud"); Wearing of Insignia with Intent to Deceive, OKLA. STAT. tit. 21, § 1514 (2002) (criminalizing the wearing of organizational insignia to obtain a benefit, listed under "False Pretenses, False Personations, Cheats and Frauds").

258. *See, e.g.*, 18 U.S.C. § 1035 (2006) (criminalizing fraudulent statements made in pursuit of health care benefits); 18 U.S.C. § 1344 (2006) (prohibiting "schemes or artifices . . . to obtain . . . funds, credits, assets, securities, or other property . . . by means of false or fraudulent pretenses, representations, or promises").

259. *See, e.g.*, *State v. Messer*, 91 P.3d 1191, 1193 (Kan. 2004) (requiring only the assumption of the false identity).

260. This is especially true when the individual is impersonating a government official. *United States v. Lepowitch*, 318 U.S. 702, 704 (1943) ("[T]he purpose of the [false personation] statute was

follows “some course he would not have pursued but for the deceitful conduct.”²⁶¹ In this way, “a person may be defrauded although he parts with something of no measurable value at all.”²⁶² Federal circuit courts of appeals have embraced this understanding. For example, in *United States v. Robbins*²⁶³ the defendant impersonated an FBI agent but did not assert the authority accorded a federal law enforcement officer or leverage his stolen status for any financial benefit.²⁶⁴ Rather, Robbins merely used his purloined authority to carry a gun and handcuffs in front of his girlfriend or into various businesses.²⁶⁵ The only harm was that “people . . . tolerated such acts and accorded some deference to Robbins . . . in reliance on the authority that an FBI agent possesses in order to carry out the duties of his profession.”²⁶⁶ Yet this harm was sufficient to support a conviction for impersonation of a federal official.²⁶⁷ Thus, false personation requires some form of *reliance* but not necessarily a pecuniary harm.

IV. THE SVA REQUIRES ONLY MINOR REVISIONS TO CONFORM WITH THE FIRST AMENDMENT

As noted by the *Alvarez*,²⁶⁸ *Strandlof*,²⁶⁹ and *Kepler*²⁷⁰ courts, the SVA does not require any showing of reliance, which invalidates its

‘to maintain the general good repute and dignity of the [government] service itself . . .’” (last alteration in original) (quoting *United States v. Barnow*, 239 U.S. 74, 80 (1915))).

261. *Lepowitch*, 318 U.S. at 704.

262. *Id.* at 705. This broad definition of injury led to the removal of the statutory phrase “intent to defraud the United States or any person.” 18 U.S.C. § 912 note (2006) (Historical and Revision Notes) (finding the phrase “meaningless”). However, several circuit courts have found the phrase “meaningless” because the intent to defraud “would be present whenever the element ‘acting as [a federal official]’ was proven.” *United States v. Wilkes*, 732 F.2d 1154, 1158 (3d Cir. 1984); *accord* *United States v. Robbins*, 613 F.2d 688, 690–92 (8th Cir. 1979); *United States v. Rosser*, 528 F.2d 652, 655 n.13 (D.C. Cir. 1976).

263. 613 F.2d 688.

264. *Id.* at 689–90.

265. *Id.*

266. *Id.* at 692; *see also* *United States v. Hamilton*, 276 F.2d 96, 97 (7th Cir. 1960) (holding that carrying a gun around a rented house sufficed to sustain a false personation conviction).

267. *Robbins*, 613 F.2d at 692.

268. *United States v. Alvarez*, 617 F.3d 1198, 1212 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 11-210).

269. *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1188 (D. Colo. 2010), *argued*, No. 10-1358 (10th Cir. May 12, 2011).

270. *United States v. Kepler*, No. 4:11-cr-00017-JAJ, slip op. at 4 n.1 (S.D. Iowa May 31, 2011), *appeal docketed*, No. 11-2278 (8th Cir. June 10, 2011).

construction as an anti-fraud measure under *Madigan*.²⁷¹ However, the SVA complies with the remaining *Madigan* factors as well as other First Amendment mandates. Therefore, Congress should narrowly amend the SVA to require reliance on the part of the listener.

A. Congress Should Narrowly Amend the SVA to Comport with the Fraud Exception to the First Amendment

When the SVA's statutory text is juxtaposed with the *Madigan* requirements for a constitutional anti-fraud measure,²⁷² a deficiency appears: the element of actual reliance. The SVA prohibits anyone from "falsely represent[ing] himself or herself, verbally or in writing, to have been awarded any [military] decoration."²⁷³ The *Alvarez*, *Strandlof*, and *Kepler* courts correctly pointed to the absence of actual reliance by the target of the false statement as fatal to the argument that the SVA is an anti-fraud measure.²⁷⁴ Thus, Congress should amend the SVA to require reliance on the part of the listener and bring the SVA into compliance with the *Madigan* formula for constitutional anti-fraud measures.²⁷⁵

Though the *Alvarez* court suggested that economic injury is another essential element of fraud missing from the SVA,²⁷⁶ Congress should only require reliance. Because the SVA prohibits a form of false personation,²⁷⁷ and false personation requires only that the deceived

271. The *Madigan* Court succinctly articulated the elements of a constitutional anti-fraud measure: an intentional and material false statement, designed to mislead the listener, which succeeds in doing so. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003).

272. *Id.*

273. 18 U.S.C. § 704(b) (2006).

274. *See* *United States v. Alvarez*, 617 F.3d 1198, 1212 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3237 (U.S. Oct. 17, 2011) (No. 11-210); *United States v. Kepler*, No. 4:11-cr-00017-JAJ, slip op. at 4 n.1 (S.D. Iowa May 31, 2011), *appeal docketed*, No. 11-2278 (8th Cir. June 10, 2011); *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1188 (D. Colo. 2010), *argued*, No. 10-1358 (10th Cir. May 12, 2011).

275. Rep. Joe Heck has already introduced a bill to amend the SVA. *Stolen Valor Act of 2011*, H.R. 1775, 112th Cong. (2011). Heck's bill addresses fraudulent representation more explicitly by requiring the statement to be in pursuit of "anything of value." *Id.* § 2. However, it does not require any form of reliance by the listener, suffering the same infirmity as the currently enacted version of the SVA. *Id.* Additionally, it does not recognize the panoply of non-pecuniary harms which the SVA was designed to prevent. *Id.*

276. *Alvarez*, 617 F.3d at 1211–12 (suggesting that an economic harm is required for certain fraud claims).

277. False personation is defined as falsely representing oneself as another for the purposes of deceit. BLACK'S LAW DICTIONARY 822 (9th ed. 2009). Therefore, when somebody falsely represents they have received military honors, they are representing themselves as a decorated veteran, thus implicating false personation.

listener alter his behavior based upon the false statement,²⁷⁸ it is not necessary for the SVA to include pecuniary harm as an element of the offense it proscribes. The SVA prohibits a form of false personation because when an individual falsely claims military honors, he or she claims the attendant reputational enhancement as well.²⁷⁹ For example, as a result of claiming military honors, one may receive “more respect from neighbors, acquaintances, and potential business associates.”²⁸⁰ The potential for translating this enhanced reputation into some benefit for the claimant is wide and varied.²⁸¹ Indeed, Senator Kent Conrad, the Senate sponsor of the SVA, alluded to this very danger when introducing the SVA.²⁸² Furthermore, like other forms of false personation, these violations can result in non-pecuniary injury.

One area where violations of the SVA can result in non-pecuniary injury is in the judicial system. False claims to military awards can be detrimental to a judicial system reliant on determinations of individuals’ reputations. For example, a witness claiming receipt of military decorations may enhance his or her credibility. In *Cartwright v. Goodyear Tire & Rubber Co.*,²⁸³ the plaintiff claimed a wide variety of military honors.²⁸⁴ In opening and closing arguments, Cartwright’s attorney extolled his client’s military service, and the jury returned an eleven million dollar million verdict.²⁸⁵ However, evidence discovered after trial cast serious doubt on Cartwright’s claims.²⁸⁶ The trial court, in

278. *See supra* Part III.

279. *See supra* Part I.

280. Volokh, *supra* note 143, at 353.

281. *See, e.g.*, *United States v. Iannone*, 184 F.3d 214, 217–19 (3d Cir. 1999). John Michael Iannone posed as a decorated Vietnam veteran and developed several relationships based on his veteran status. *Id.* Iannone capitalized on his relationships to defraud his “friends” of over \$600,000. *Id.* Iannone was convicted on eight different counts of fraud. *Id.* at 219.

282. 151 CONG. REC. S12,688 (daily ed. Nov. 10, 2005) (statement of Sen. Conrad) (“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.”).

283. 665 N.E.2d 365 (Ill. App. Ct. 1996). *Cartwright* was a products liability case concerning a failure of a truck tire. *Id.* at 367. The case hinged on whether the jury believed Cartwright’s own testimony about the events, or the defense expert whose theory of the accident was incompatible with Cartwright’s timeline of events. *Id.* at 368–70.

284. *Id.* at 368.

285. *Id.* at 370.

286. *Id.* After the trial, Goodyear’s counsel apparently received a letter from the United States Army disputing Cartwright’s military history. *Id.* at 372. Goodyear’s counsel subpoenaed Cartwright’s military record, which served as the factual foundation for the subsequent successful appeal. *Id.*

considering a motion to set aside the verdict, held that Cartwright's purported military service and heroism were "irrelevant and immaterial."²⁸⁷ However, the appellate court reversed, stating that claims of military valor could not be considered irrelevant or immaterial to the jury's decision where the witness's credibility was crucial to the verdict.²⁸⁸ In another case, a juror affirmatively stated that wearing of a Purple Heart enhanced the witness's credibility.²⁸⁹

Because falsely claiming military decorations is a form of false personation which could result in a non-pecuniary injury, an amended SVA need only require that deceived listeners follow some "course [they] would not have pursued but for the deceitful conduct."²⁹⁰ The amended provision could prohibit knowing false representations about receipt of military decorations that cause another to act in reliance on the false representation. Such an amendment would satisfy all of the *Madigan* factors defining an anti-fraud measure: proscription of an intentional and material false statement, made with the intent of misleading the listener, which succeeds in doing so.²⁹¹ This proposed amendment would address the First Amendment concerns surrounding proscription of false statements and would still effectively combat non-pecuniary harms associated with false claims of military honors.

B. The SVA Satisfies the Other Madigan Factors and Conforms with Other First Amendment Mandates

Although the SVA fails to require actual reliance, the Act as written satisfies the remaining *Madigan* factors defining a constitutional anti-fraud statute.²⁹² Additionally, the SVA conforms to other First Amendment mandates because it does not chill protected speech²⁹³ and does not regulate speech based upon the viewpoint of the speaker.²⁹⁴

287. *Id.* at 372.

288. *Id.*

289. See *supra* notes 52–65 and accompanying text.

290. *United States v. Lepowitch*, 318 U.S. 702, 704 (1943).

291. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003); see also *supra* Part II.C.

292. In addition to reliance, *Madigan* requires a knowing and material false statement, made with the intent to mislead the listener. *Id.*

293. For a discussion of chilling protected speech, see *supra* notes 138–144 and accompanying text.

294. For a discussion of regulations based on viewpoint, see *supra* notes 145–154 and accompanying text.

1. *The SVA Can Be Construed to Prohibit Only Intentional and Material False Statements Intended to Defraud the Listener*

The *Madigan* Court defined a fraudulent statement as one that is intentionally misleading, knowingly false, material, and induces reliance on the part of the listener.²⁹⁵ The SVA provides criminal penalties for anyone who “falsely represents . . . to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States”²⁹⁶ With the exception of actual reliance, the plain language of this provision comports with *Madigan*’s definition of a fraudulent statement.

The SVA’s proscription of false representations of military honors satisfies *Madigan*’s requirement of an intentionally misleading, knowingly false statement. *Webster’s Third International Dictionary* defines “falsely” as either dishonestly or deceitfully.²⁹⁷ *Webster’s* defines “represent” as “to bring clearly before the mind: cause to be known, felt, or apprehended.”²⁹⁸ Similarly, the *Oxford English Dictionary* (OED) defines “falsely” as “[w]rongfully . . . [d]ishonestly, fraudulently . . . [d]eceptively, [or] treacherously.”²⁹⁹ The OED defines “represent” as “[t]o bring clearly and distinctly before the mind . . . [or] to state or point out explicitly or seriously to one, *with a view to influencing action or conduct*.”³⁰⁰ Taken together, these definitions support several conclusions. First, “false” speech, defined either as dishonest or deceitful,³⁰¹ is inherently intentional. The definitions of “represent” require the actor to bring a concept clearly before the mind of the listener, requiring purposeful conduct.³⁰² Other definitions support this concept of intentional conduct. *Webster’s* states that when an actor “represents” he or she *causes* the concept to be known.³⁰³ Further, the OED’s definition requires the actor to “state or point out explicitly or

295. *Madigan*, 538 U.S. at 620. See *supra* Part II.C for full discussion of *Madigan* and its requirements.

296. 18 U.S.C. § 704(b) (2006).

297. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 819 (2002).

298. *Id.* at 1926.

299. 4 OXFORD ENGLISH DICTIONARY 50 (1933).

300. 8 OXFORD ENGLISH DICTIONARY 479 (1933) (emphasis added).

301. 4 OXFORD ENGLISH DICTIONARY, *supra* note 299; WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 297, at 819.

302. 8 OXFORD ENGLISH DICTIONARY, *supra* note 300; WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 297, at 1926.

303. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 297, at 1926.

seriously.”³⁰⁴ Second, the actor must speak with a certain level of malice. False speech is variously characterized as dishonest or deceitful.³⁰⁵ Either characterization suggests that one who “falsely represents” a fact—such as receipt of a military decoration—does so with malicious intent to deceive the listener. Third, not only does the statutory language suggest a requirement of intent to deceive, it also supports a requirement for intent to defraud.³⁰⁶ This flows not only from the OED definition, wherein “represent” encompasses statements made “with a view to influencing action or conduct,”³⁰⁷ but also from the intent of deceitful statements. Thus, “falsely represent” logically requires a knowingly false statement that is intended to mislead or deceive the listener.

The SVA’s subject matter—military honors—satisfies the materiality requirement. A material statement must have some tendency or capability to entice the listener to alter their behavior.³⁰⁸ Military honors symbolize significant historical and character details, which can and do influence individuals.³⁰⁹ Therefore, because the SVA proscribes false statements about military honors, it satisfies *Madigan*’s materiality requirement.

2. *The SVA Neither Chills Protected Speech Nor Discriminates Based upon the Viewpoint of the Speaker*

In addition to addressing the remaining *Madigan* factors defining a constitutional anti-fraud statute, the SVA conforms to other First Amendment mandates by proscribing a small subset of autobiographical speech and doing so without regard for the viewpoint of the speaker. The First Amendment does not tolerate vague proscriptions on speech because such action inhibits individuals from engaging in protected speech activities for fear of criminal prosecution.³¹⁰ However, the SVA

304. 8 OXFORD ENGLISH DICTIONARY, *supra* note 300.

305. 4 OXFORD ENGLISH DICTIONARY, *supra* note 299; WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 297, at 819.

306. As noted by the Fifth Circuit, “[i]ntent to deceive and intent to defraud are not synonymous. Deceive is to cause to believe the false or to mislead. Defraud is to deprive of some right, interest or property by deceit.” *United States v. Godwin*, 566 F.2d 975, 976 (5th Cir. 1978).

307. 8 OXFORD ENGLISH DICTIONARY, *supra* note 300.

308. *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (“The statement must have ‘a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed.’” (alteration in original) (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988))).

309. *See supra* Part I.

310. *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997); *see also supra* notes 138–144 and accompanying text.

is unlikely to suffer from this constitutional defect, as it proscribes a narrow band of knowingly false speech.³¹¹ The line between permissible and proscribable speech is also fairly clear, in that the underlying facts (i.e., whether the speaker has been awarded a particular military decoration) would be known by the speaker who violates the SVA.³¹² Therefore, given the nature of the speech targeted by the SVA, it is unlikely that SVA prosecution would chill otherwise protected speech because the speakers are fully aware of the truth or falsity of their speech.

Similarly, although the SVA regulates the subject matter of speech (i.e., receipt of military honors), it does not target a particular viewpoint.³¹³ Because the SVA applies equally to all actors in all settings, it does not provide a vehicle for government suppression of particular points of view.³¹⁴ False claims are prosecutable under the SVA regardless of the speaker's stance on military service or other political views.³¹⁵ Thus, although the SVA regulates content, it does so "such that there is no realistic possibility that official suppression of ideas is afoot."³¹⁶

Because the SVA is not likely to chill protected speech, and because it does not regulate speech based on the viewpoint of the speaker, it satisfies the First Amendment mandates for all speech, even "unprotected" speech that is otherwise subject to government regulation.³¹⁷

CONCLUSION

Congress enacted the SVA to protect against "fraudulent claims" of

311. See *supra* notes 297–307 and accompanying text (advocating construing the SVA to require a knowing and intentional statement).

312. Volokh, *supra* note 143, at 352.

313. *Id.* at 354 ("False claims of military honors are not limited to any particular viewpoints, or even particular topics of debate.")

314. 18 U.S.C. § 704(b) (2006) (requiring only a false representation of receipt of a military award, regardless of context).

315. Volokh, *supra* note 143, at 354; *cf.* *Schacht v. United States*, 398 U.S. 58, 62–63 (1970) (stating the First Amendment prohibits the *conditional* use of a military uniform because of the potential for viewpoint discrimination); *LightHawk, the Env'tl. Air Force v. Robertson*, 812 F. Supp. 1095, 1102 (W.D. Wash. 1993) (suggesting that the First Amendment does not tolerate conditioning the use of a government symbol based upon the viewpoint of the speaker).

316. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

317. See *supra* notes 135–155 and accompanying text; see also *R.A.V.*, 505 U.S. at 388 (noting that the government cannot use a permissible regulation of speech, such as obscenity, to bootstrap an impermissible viewpoint restriction, such as prohibiting only obscene *political* messages).

military decorations because such claims devalue the reputation and meaning of the medals.³¹⁸ In doing so, Congress recognized the symbolic power of military decorations and the potential for harm from false claims of military honors.³¹⁹ However, because the SVA directly regulates speech, it must comply with the requirements of the First Amendment by either passing strict scrutiny or by regulating only a narrow category of speech such as fraud. The SVA satisfies many of the requirements of an anti-fraud statute, but it fails to require reliance on the part of the listener.

Fortunately, the SVA's constitutional infirmities are easily remedied. Congress need only amend the Act to prove reliance on the part of the listener. Moreover, Congress need not require any showing of pecuniary injury. By making this slight modification to the SVA, Congress would cure the Act's constitutional issues and yet still protect the public against fraudsters who would misappropriate military honors to inflict a variety of harms.

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

319. *See, e.g.*, 151 CONG. REC. S12,688 (daily ed. Nov. 10, 2005) (statement of Sen. Conrad). (“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.”).