WHY SERVE YOUR COUNTRY WHEN YOU CAN LIE ABOUT IT?—This Message Brought to You by the United States Supreme Court

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INTRODUCTION

"The [Medal of Honor] is the highest and most prestigious U.S. military medal."[1] The criteria for awarding the Congressional Medal of Honor are strict and similar to the standard that must be met by a prosecutor's evidence in a criminal proceeding.[2] Military honors have a long history of being conferred to individuals who distinguish themselves from the ranks. In America, the first honor of this type was established by General George Washington, who proclaimed in his general order that "[s]hould any who are not entitled to these honors have the insolence to assume the badges of them, they shall be severely punished. On the other hand it is expected those gallant men who are thus designated will on all occasions be treated with particular confidence and consideration."[3]

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1. Department of Defense Manual 1348.3 Vol. 1 Nov. 23, 2010, Incorporating Change 1, Oct. 12, 2011, 31, *available at* https://docs.google.com/a/asu.edu/viewer?a=v&q=cache:YKYqEc0yULYJ:www.dtic.mil/whs/directives/corres/pdf/134833vol1.pdf+&hl=en&gl=us&pid=bl&srcid=ADGEESif1qMspvffgfm1OlmGgN8zL36dbedr_oE7oLu0fqeBUfTKcdUYkQFj6LzwEeY0CQPMAcfPM2P5onUsoVpCkni8uEXcEDQyiX8uNnx6qGe4neIqoPWoti7goJKivNM9JcM36_Sy&sig=AHIEtbRywczPwjtOycRJAbTPZW12lBt3tg.

2. The Medal of Honor is only "awarded to members of the U.S. Armed Forces who distinguish themselves conspicuously by gallantry and intrepidity at the risk of their lives above and beyond the call of duty" while engaged in either "an action against an enemy of the United States," "military operations involving conflict with an opposing foreign force," or "[w]hile serving with friendly foreign forces engaged in an armed conflict against an opposing armed force in which the United States is not a belligerent party." *Id.* at 31–32. The act that is being awarded the Medal "must have been one of personal bravery or self-sacrifice so conspicuous as to clearly distinguish the individual above his or her comrades and must have involved risk of life." *Id.* at 32. The medal requires "[p]roof beyond a reasonable doubt that the Service member performed the valorous action for which they were recommended . . . ." *Id.*

3. The George Washington Papers at the Library of Congress, 1741-1799". *George Washington, August 7, 1782, General Orders*. August 7, 1782. Retrieved October 1, 2006.

Given the regard that our founding father, and people today, have for awardees of military honors, it is not surprising that there has been an upsurge in the amount of individuals claiming to have received such honors.[4] In response to this dilemma, the Stolen Valor Act of 2005 was adopted in 2006.[5] The Act criminalizes those who falsely claim they were awarded military medals or decorations.[6] In addition, the Act provides for enhanced penalty on those that claim the Medal of Honor.[7]

The United States Supreme Court recently ruled on the constitutionality of the Stolen Valor Act, and found, in a six to three decision, the Act unconstitutional because it "infringes upon speech protected by the First Amendment."[8] The Court has a responsibility to uphold the Constitution, and in *United States v. Alvarez*[9] is understandably concerned about ramifications of their decision on free speech and precedent case law set based on their ruling.

The ruling, although analyzed with strict scrutiny and not significantly divergent from First Amendment analysis of past cases before the Court, may, however, create a precedent with far-reaching implications for members of the military. There is significant concern that the actions of people thought to have received a military honor could have a tarnishing effect on the honors themselves and on the perception of military personnel that did in earnest receive the awards.[10] The Act prohibits certain aspects of speech, in particular false factual statements.[11] These statements are not an affront to the First Amendment, and therefore the Act is a constitutional restriction on free speech. The Court's majority reasoning falls short in protecting those who have received military honors, misinterprets key aspects of the Act and misconstrues the elements required in the Act that would make a valid restriction of free speech.

This Comment will primarily juxtapose the reasoning of the majority and the dissent in the Supreme Court decision in *Alvarez*. Part I will discuss the level of scrutiny under which content based, First Amendment challenges are evaluated. Part I also discusses the specific elements that the Court used when evaluating the particular facts in *Alvarez*. Part II will dive into the background facts relating to *Alvarez*, an overview of how the Stolen Valor

4. *See* United States v. Alvarez, 132 S. Ct. 2537, 2556 (2012) (Alito, J., dissenting).
5. 18 U.S.C. § 704 (2006).
6. *Id.* § 704 (b).
7. *Id.* § 704 (c).
8. United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012).
9. *Id.*
10. *See* United States v. Alvarez, 132 S. Ct. 2537, 2560 (2012) (Alito, J., dissenting).
11. *See* 18 U.S.C. § 704 (2006).

Act is applied to said facts, and a brief procedural history leading up to the Supreme Court decision. Part III will describe the analyses of the differing opinions within the Court, focusing primarily on the elements of strict scrutiny described in Part I, and how the majority and dissent differ in their analyses of each element. Part IV will discuss implications arising out of the Court's decision, and steps taken in wake of the ruling.

I. FIRST AMENDMENT ANALYSIS

"Congress shall make no law . . . abridging the freedom of speech . . . ."[12] Although the First Amendment makes it clear that Congress cannot make a law that curbs the public's right to say what they choose, content based regulation of speech may be permissible.[13] Because "[c]ontent-based regulations are presumptively invalid,"[14] content based regulation on speech generally must statisfy a strict scrunity standard to avoid a ruling of unconstitutionality.[15]

When evaluating the First Amendment, the Court assumes that all speech is presumptively free from government regulation, except in the few limitations that do exist and that are not offered this protection.[16] The Court can look at these limitations in any order, or holistically all at once.[17] Every limitation to free speech is from a historic and traditional category; "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct."[18]

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12. U.S. CONST. amend. I.

13. *See* RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT 32 (4th ed. 2012).

14. R.A.V. v. City of St Paul, 505 U.S. 377, 382 (1992).

15. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000) (holding that a law requiring cable companies to scramble images of sexual based channels or to restrict programming of said channels to specific hours violates the First Amendment unless the government can show that it is the least restrictive means available of accomplishing state interests).

16. Kathryn Smith, *Hey! That's My Valor: The Stolen Valor Act and Government Regulation of False Speech Under the First Amendment*, 53 B.C. L. REV. 775, 786 (2012).

17. *See id.*

18. Jared Paul Haller, *United States v. Alvarez: What Restrictions does the First Amendment Impose on Lawmakers who Wish to Regulate False Factual Speech?*, 45 IND. L. REV. 191, 194–95 (2011); *see also R.A.V.*, *supra* note 14, at 382–83 ("From 1791 to the present . . . our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighted by the social interest in order and morality.'" (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942))).

The Court in *Alvarez* notes and recognizes that "[a]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[19] It further notes that "[a]s a result, the Constitution 'demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality.'"[20] The Court does, however, concede that content based restrictions on speech are permitted, when limited to the "few historic and traditional categories"[21] previously discussed. The Court operates under the accepted, popular view that unless the speech falls into one of these categories, the content based regulation should not be allowed, as to support "an open and vigorous expression of views in public and private conversation," and that in that support, "false statements are inevitable."[22]

For the purpose of evaluating the Stolen Valor Act, it is helpful to focus on defamation and fraud, as these offenses stem naturally from the content based arguments of false statements of fact used in *Alvarez*.[23] "[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."[24]

"Defamation is the act of harming the reputation of another by making a false statement to a third person."[25] In defamation, there needs to be harm to a specific person or entity.[26] The government has an interest in protecting the interests of citizens against the actions of other citizens.[27] However, when the targeted person is a public figure, less defamation protection is offered to that person, and more First Amendment protection is offered to the speaker.[28] In this way, issues of public concern are able to be discussed openly without fear of reprisal.[29]

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19. United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012) (quoting Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573 (2002) (internal quotations omitted)).

20. *Id.* at 2543–44 (quoting Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 660 (2004)).

21. *Id.* at 2539.

22. *Id.* at 2544.

23. *See* Nicholas Mull, *Stolen Valor Act: A Constitutional Instrument to Prosecute "Public Fraud,"* 13 J.L. SOC'Y 317, 321; *Alvarez*, 132 S. Ct. at 2539–2540.

24. *See* Mull, *supra* note 23, at 321 (quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964)).

25. Smith, *supra* note 16, at 787.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

The Court in *Alvarez* sets forth some elements that need to be met to satisfy the strict scrutiny standard that the content based restriction is valid;[30] (1) The restriction must be a "knowing falsehood or reckless disregard for the truth;"[31] (2) "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented;"[32] (3) the restriction must be "limited in its reach" with evidence that the statement was used to "gain a material advantage;"[33] and (4) the control must be the least restrictive means available of accomplishing the goal of the state.[34]

Although Justices Breyer and Kagan, in a concurring opinion, approach the particular case in *Alvarez* using an intermediate level of scrutiny instead of the strict standard used by the plurality,[35] I examine the Court's reasoning under the strict scrutiny standards described above. I examine the reasoning in such a way because the majority's analysis will be more binding on subsequent lower court decisions and if the fact pattern can sustain a strict scrutiny standard, which I believe it can, it can surely sustain an intermediate level of scrutiny.

II. BACKGROUND

Xavier Alvarez became a board member of the Three Valley Water District Board, a governmental body in Claremont California, in 2007.[36] He attended his first public meeting that same year and proclaimed the following: "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."[37] None of what Alvarez claimed at the Board meeting was true.[38] He was never a Marine, and thus certainly, he was never awarded the Congressional Medal of Honor, our nation's highest military decoration.[39] Alvarez made these statements in a

30. United States v. Alvarez, 132 S. Ct. 2537, 2545, 2547–49 (2012).
31. *Id.* at 2545.
32. *Id.* at 2549.
33. *Id.* at 2547–48.
34. *Id.* at 2551.
35. United States v. Alvarez, 132 S. Ct 2537, 2551–52 (2012) (Breyer, J., concurring).
36. *Id.* at 2542 (majority opinion).
37. United States v. Alvarez, 617 F.3d 1198, 1200 (9th Cir. 2010).
38. *Alvarez*, 132 S. Ct. at 2542.
39. *Id.*

"pathetic attempt to gain respect that eluded him,"[40] in other words, to profit emotionally and through stature, by lying about receiving the award.[41]

Even before Alvarez was elected to the water district board, he was making outlandish claims about his "military career."[42] He told a woman that he had been awarded the Medal of Honor "for rescuing the American Ambassador during the Iranian hostage crisis" and that he was shot from behind in an attempt to retrieve the American flag from the embassy.[43] He also told a different woman that he was a helicopter pilot in Vietnam.[44] He said that his helicopter was shot down, but he was still able to get the helicopter into the air to fly away.[45] One of these women reported Alvarez to the Federal Bureau of Investigations (FBI).[46] The FBI, during investigation of Alvarez somehow acquired a recording of his statements at the board meeting in 2007.[47]

Congress created the Stolen Valor Act to stop the kind of behavior demonstrated by Alvarez.[48] The Act prohibits false verbal and written claims about oneself receiving military medals, decorations, or other such honors.[49] In addition, the Act provides an "enhanced penalty" when the defendant has claimed the Medal of Honor.[50] Applying the facts from *Alvarez* to the language of the Act, it can be presumed that Alvarez would be a candidate to be prosecuted under the Act, and that a higher penalty should be sought based on the nature of Alvarez's offense. He made a false verbal claim that he had received the Congressional Medal of Honor. This is directly prohibited by the Act.[51]

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40. *Id.*
41. *See id.*
42. United States v. Alvarez, 617 F.3d 1198, 1201 (9th Cir. 2010).
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *See id.*
48. *See* 18 U.S.C. § 704 (2006).
49. *Id.* § 704(b) ("Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decorations 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.").
50. *Id.* § 704(c) (enhancing the penalty to not more than one year imprisonment). Note that other medals carry this enhanced penalty as well. These include a distinguished service cross, a Navy cross, an Air Force Cross, a silver star, a Purple Heart, "or any replacement or duplicate medal for such medal as authorized by law." *Id.* at § 704(d).
51. *Id.* § 704(c).

The Government prosecuted Alvarez, and in defense, Alvarez challenged the constitutionality of the Act.[52] The Ninth Circuit agreed with him,[53] holding the Act unconstitutional as a First Amendment violation.[54] The Supreme Court affirmed.[55]

III. ANALYSIS

The Court's majority reasoning during its ruling on the Stolen Valor Act seems sensible on the surface. However, it falls short in protecting those who have received military honors, misinterprets key aspects of the Act, and misconstrues the elements required in the Act that would make a valid restriction of free speech.

Justice Alito, joined by Justices Scalia and Thomas, dissent, arguing that the Stolen Valor Act is not unconstitutional and does not infringe free speech.[56] The dissent recognizes that the Act was a step taken by Congress to address, and attempt to cure, the "epidemic of false claims about military decorations."[57] For example, in one year more than 600 Virginians dishonestly claimed to have received the Medal of Honor.[58]

The following sections compare and contrast the majority and dissenting opinions in *Alvarez* according to the elements, set forth in Part I, that must be met to satisfy the strict scrutiny standard that the content based restriction is valid.

A. Knowing Falsehood or Reckless Disregard for the Truth

First, the Court attempts to portray Alvarez as someone who didn't know what he was doing.[59] The language of the Court majority seems to insinuate that because "[l]ying was his habit," and that Alvarez had lied about other outlandish feats, like playing professional hockey and marrying a Mexican celebrity, that this is just common place for Alvarez and not an attempt to commit a criminal act.[60]

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52. United States v. Alvarez, 617 F.3d 1198, 1201 (9th Cir. 2010).
53. *Id.* at 1218.
54. *Id.*
55. United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012).
56. United States v. Alvarez, 132 S. Ct. 2537, 2556–57 (2012) (Alito, J., dissenting).
57. *Id.*
58. *Id.* at 2558.
59. *See id.* at 2542.
60. *Id.*

The first element of a knowing or reckless falsehood is framed in the instances of defamation or fraud, which the Court has conceded are valid restrictions of the First Amendment.[61] The Court holds that this rule was formed in order to tolerate speech and not to restrict it; "to allow more speech, not less;" that limits liability for tortious wrongs, and does not expand liability to a "far greater realm of discourse and expression."[62]

The dissent contends that "the [Stolen Valor] Act concerns facts that are squarely within the speaker's personal knowledge" and that "a conviction under the Act requires proof beyond a reasonable doubt that the speaker actually knew that the representation was false."[63] In regards to the knowingly and reckless falsehood requirement, the dissent provides insight into other federal statutes that proscribe falsehoods with no First Amendment challenge, and that have "no close common-law analog."[64]

One example of this is the impersonation of a federal officer.[65] This law requires no monetary gain or loss for the perpetrator to be susceptible to prosecution.[66] The purpose behind this law is simply to "maintain the general repute and dignity of the Government service."[67] In this case it is enough that the perpetrator knows he or she is not a federal agent and still pretends to be (lies about being) one. It is also enough to uphold the law, that the law, like the Stolen Valor Act, has no provision for monetary advantage.[68]

Both the majority and the dissent recognized that there must be a knowingly and reckless falsehood involved to remain outside of the reach of the First Amendment. Others have weighed in on this subject as well with not surprisingly similar views as the dissent.[69] The Court itself recently held

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61. *See id.* at 2545.

62. *Id.*

63. *Id.* at 2557 (Alito, J., dissenting).

64. *Id.* at 2561 ("The most well known of these is probably 18 U.S.C. § 1001, which makes it a crime to 'knowingly and willfully' make any 'materially false, fictitious, or fraudulent statement or representation' in 'any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.").

65. *Id.* at 2562 (discussing 18 U.S.C. § 912 (2006)).

66. *Id.*

67. *Id.* (internal citation omitted).

68. *See id.* ("All told, there are more than 100 federal criminal statutes that punish false statements made in connection with areas of federal agency concern. . . . These examples amply demonstrate that false statements of fact merit no First Amendment protection in their own right.").

69. Robert J. Juge, III, *Heroism, Valor, and Deceit: False Claims of Military Awards and the First Amendment*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 267, 287 ("While negligent false statements are protected so that we do not deter otherwise valuable speech, calculated falsehoods do not pose the same threat."); Michael J. Davidson, *Bits of Ribbon and Stolen*

that it is possible that there is content worthy of being restricted and falling outside of the First Amendment, yet for what ever reason, up until now, has not been recognized.[70]

It is obvious, unless because of some mental illness, that someone would know if his statement about receiving particular honors and decorations is false. If he were confused on the issue of whether or not he received said honors, there are avenues for him to find out if he actually were entitled to the awards. For example, he could conduct independent research of his military records and paperwork (e.g., Department of Defense Form 214—Certificate of Release or Discharge from Active Duty), if he were ever in the military, to be absolutely sure what awards he is entitled to. In this respect, the knowingly and reckless falsehood element is met to lean toward a ruling of constitutionality of the Act and exception from the protection afforded by the First Amendment.

B. Direct Causal Link, Limited in Reach & to Gain a Monetary Advantage

The second requirement, of demonstrating a direct causal link between the restriction and harm, is framed by the Majority in terms of the Government's interest and public perception.[71] The Court argues that although the Government has a compelling interest "in protecting the integrity of the Medal of Honor," the Stolen Valor Act is not "actually necessary" to reach those ends.[72] The Court finds that the Government has not posited any evidence to support that the public's opinion and "perception of military awards [are] diluted by false claims."[73]

The majority further attacks the Act because it does not require the person making the statement to have made the statement in an effort to profit materially.[74] By not having this requirement in the Act, the Court argues, the reach of the Act is too broad and encompassing, and is unlike other valid restrictions of speech that contain provisions against false claims

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Valor, 58-SEP FED. LAW. 20, 24 ("[S]uch speech appears to have no redeemable social value . . . it is far from clear that such speech is linked to other forms of speech that actually matters and is thus deserving of protection.").

70. Brown v. Ent. Merchants Assn. 131 S. Ct. 2729, 2734 (2011) (holding that there may be "persuasive evidence that a novel restriction on content is part of a long (heretofore unrecognized) tradition of proscription").

71. United States v. Alvarez, 132 S. Ct. 2537, 2549 (2012).

72. *Id.*

73. *Id.*

74. *Id.* at 2547.

that "are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment."[75]

The majority is also concerned about what Justice Breyer aptly indicated in his concurring opinion: a chilling effect on other forms of speech.[76] The majority does not buy into the Government's arguments that the Act allows "breathing room" for other speech that may criticize the military awards or their importance.[77]

The dissent recognizes the Stolen Valor Act as narrow, as not presenting a threat to free speech, and as protecting against a present harm perpetrated against actual recipients.[78] They view it as the people's representative body making a statement that lying about receiving military awards differs from lying about civilian awards, and is thus narrow in scope.[79]

The dissent posits that the Act is limited in reach because: (1) "[T]he Act applies to only a narrow category of false representations about objective facts that can almost always be proved or disproved with near certainty";[80] (2) "the Act applies only to statements that could reasonably be interpreted as communicating actual facts; it does not reach dramatic performances, satire, parody, hyperbole, or the like";[81] and (3) "the Act is strictly viewpoint neutral" in the way that statements the Act restricts are often not likely to concern politics or any ideology.[82] The Act also "applies equally to all false statements, whether they tend to disparage or commend the Government, the military, or the system of military honors."[83]

The dissent agrees with the majority that individuals lie about receiving military honors for some material end.[84] They also concede that some benefits can be intangible.[85] They question the majority's rationale in

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75. *Id.*

76. United States v. Alvarez, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring) ("[A]s the Court has often said, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart." (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340–41 (1974))). Justice Breyer also notes that the Court attempts to allow "more valuable speech" by attempting to limit the fear of liability a speaker of truth incurs by speaking. *Id.*

77. *Alvarez*, 132 S. Ct. at 2543.

78. *Id.* at 2560, 2565 (Alito, J., dissenting).

79. *Id.*

80. *Id.* at 2557.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 2559–60.

85. *Id.* at 2560.

demanding a law that applies restrictively to falsities that are made in order to profit financially.[86]

> But much damage is caused, both to real award recipients and to the system of military honors, by false statements that are not linked to any financial or other tangible reward. Unless even a small financial loss—say, a dollar given to a homeless man falsely claiming to be a decorated veteran—is more important in the eyes of the First Amendment than the damage caused to the very integrity of the military awards system . . . .[87]

Not all harm can be quantified monetarily, such as by receiving government benefits or contracts.[88] Some harm can damage reputation, in this instance the reputation of those who have legitimately received such awards.[89] The dissent goes one step further and compares this situation to trademark law.[90] They claim that when these false claims exist, that the "signal" given out by the Medal of Honor is blurred as proliferation of fakes flood the market. [91] Proliferation also makes the awards seem less rare than they really are, and creates harm by destroying morale.[92] If the Court thinks it important to restrict the use of the term "Olympic" for fear of "lessening the distinctiveness" of the term, then surely the distinctiveness of the Medal of Honor and related military honors is worthy of similar protection.[93]

The dissent attacks the majority's stance that the Stolen Valor Act, if held to be constitutional, would open the gates for more legislation of this type by the Government and create a "chilling effect" of the First Amendment.[94] They concede that if a similar rule were passed in areas of philosophy, history, and the like, that this chilling effect may occur and interfere with the free flowing of ideas.[95] They then differentiate the Act from these other areas of academia, saying that unlike these areas, the Act "presents no risk at all that valuable speech will be suppressed. The Speech punished by the Act is not only verifiably false and entirely lacking in

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86. *Id.*
87. *Id.*
88. *Id.* at 2559.
89. *See id.*
90. *Id.*
91. *Id.* The dissent took these ideas from William M. Landes & Richard Posner, *Trademark Law: An Economic Perspective*, 30 J. Law & Econ. 265, 308 (1987).
92. *Alvarez*, 132 S. Ct. at 2559 (Alito, J., dissenting).
93. *Id.* (quoting San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 539–41 (1987)).
94. *Alvarez*, 132 S. Ct. at 2563–64.
95. *Id.* at 2564.

intrinsic value, but it also fails to serve any instrumental purpose that the First Amendment might protect."[96] In fact, Alvarez's council, when posed the question about what speech the Act would chill, had to concede that there would be none.[97]

The exceptions (fraud, defamation, etc.) to the First Amendment are just that, exceptions. Identifying another exception previously unidentified does not necessarily open the door to a general, all-encompassing exception, as the majority claims. It is possible to exclude only language as proscribed by the Stolen Valor Act without giving the Government power to, in the future, exclude any false factual statements it wants regardless of content.

Agreeing with the dissent, there is certainly a "direct causal link between the restriction imposed and the injury to be prevented."[98] In this day and age, with media watching every move the military makes; with YouTube videos and email accounts being hacked, Service Members' actions do not only reflect positively or negatively upon themselves. The actions of one Service Member reflect on all Service Members.

Similarly, if someone not connected with the military, but perceived to have connection due to his lies pertaining to decorations and honors he has presumptively been awarded, were to act in a disgraceful or shameful way, then this perception may be cast on all those who have received those decorations and contemporaneously on all Service Members. If someone is lying about receiving a decoration, they most likely are not the type of person that would have the award reflect positively for Service Members. Indeed there would be a tarnishing of, or injury to the award itself, and a direct, causal injury to Service Members as well. Not only would dilution occur, as the dissent suggests, but so would real harm, akin to defamation. In this respect, the requirement of having a direct causal link between the restriction and a real injury is met.

While, as a general rule, false statements are not beyond constitutional protection, in this instance the ban is specific, dealing only with statements regarding the receipt of military honors and decorations.[99] The Supreme Court in the past has held that false statements of fact are open to relieving the protection afforded by the First Amendment.[100] However, when the

96. *Id.*

97. *Id.*

98. *Id.* at 2549.

99. 18 U.S.C. § 704(b) (2006).

100. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ([T]here is no constitutional value in false statements of fact."); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas"); Brown v. Hartlage, 456 U.S. 45, 60–61

Government uses such cases as precedent, Justice Kennedy dismisses them as "discussing defamation, fraud, or some other legally cognizable harm associated with a false statement"[101] which, according to the majority, the Stolen Valor Act does not seek to prevent.[102]

The majority sees the Act as targeting "falsity and nothing more," and believes that the Government is advancing a rule "that false statements, as a general rule, are beyond constitutional protection."[103] In actuality, the Government is very particular about what false statements of fact should receive no protection, specifically those outlined in the Act's language.[104] This idea resonates in the dissenting opinion.[105]

C. Least Restrictive Means

The Court believes that there are better ways to ensure that the integrity of military awards is preserved.[106] It claims that counter-speech would be a better tool to correct harm done by false statements from individuals who claim to have received military honors.[107] Databases can be made and the public could be made aware of the invalidity of the statements.[108] In the present case, the majority believes justice is satisfied because Alvarez's lie was made public, he received ridicule online, and was called to resign from

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(1982) (holding that the statements "are not protected by the First Amendment in the same manner as truthful statements"); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."); *see also, e.g.*, Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake"); Herbert v. Lando, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials").

101. *Alvarez*, 132 S. Ct. at 2545.

102. *Id.*

103. *Id.* at 2544–45.

104. 18 U.S.C. § 704(b) (honing in specifically on those that would represent themselves as having been awarded military decorations, medals, and honors that have been "authorized by Congress for the Armed Forces of the United States").

105. United States v. Alvarez, 132 S. Ct. 2537, 2556 (2012) (Alito, J., dissenting) ("The statute reaches only knowingly false statements about hard facts directly within a speaker's personal knowledge. These lies have no value in and of themselves, and proscribing them does not chill any valuable speech.").

106. *See Alvarez*, 132 S. Ct. at 2549.

107. *See id.* at 2550.

108. *Id.* at 2551.

the Board.[109] They believe justice was served, and that there is no need for criminal prosecution.[110]

The dissent argues that the Government has already answered the question regarding if a database would be a realistic approach to this problem.[111] The Office of Undersecretary of Defense reported to the Senate and House Armed Services Committees that it could only compile recent "recipients of certain top military honors awarded since 2001."[112]

The United States Department of Defense has recently, after the *Alvarez* decision, developed a website to chronicle the recipients of the top three military awards for valor: the Medal of Honor, Distinguished Service Cross, and Silver Star.[113] This is a good start, but the Department still acknowledges in a disclaimer at the bottom of the individual lists that the lists themselves are not all inclusive.[114] They further urge the public not to rely on the list because the list does not definitively identify all those that have been awarded the medals, and as such ought not to be used when confirming if someone has or has not been awarded specific medals.[115] So, while this effort is a good start, it does not accurately and effectively address the issue of confirming who actually has won even the top three awards of valor much less other military awards and honors.

The Government's assertions that these databases would be infeasible are generally accurate, and are corroborated by the Department of Defense.[116] Without these databases; without any way for the lay person to possibly check and see if the assertions made by a charlatan are truthful,

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109. *Id.* at 2549–50.

110. *See id.*

111. *Id.* at 2559 (Alito, J., dissenting).

112. *Id.*

113. U.S. Dep't of Def., *Award Recipients*, MILITARY AWARDS FOR VALOR – TOP 3 http://valor.defense.gov, (last visited Mar. 2, 2013).

114. *E.g.*, U.S. Dep't of Def., *U.S. Army Medal of Honor Recipients*, MILITARY AWARDS FOR VALOR – TOP 3 http://valor.defense.gov/Recipients/ArmyMedalofHonorRecipients.aspx, (last visited Mar. 2, 2013) ("This information is based on awards reporting made available to the Military Departments. In making this information public, DoD does not represent that all those members who are entitled to wear the subject awards are identified.").

115. *Id.* ("The public *should not rely* on the information on this website as a definitive identification of all those members who are recipients of the subject awards. Specifically, the information made available on this website *should not be used to confirm* whether or not an individual was awarded the subject awards for any purpose.") (emphases added).

116. *Id.* ("NOTICE: Security, privacy, and administrative reasons preclude a complete list of award recipients.").

there will be no way to curtail their false claims.[117] If there is no way to verify, then counter-speech is inherently ineffective.[118]

IV. IMPLICATIONS

When a person claims to have been awarded a military honor, they are making a statement, or more succinctly put, a representation about themselves. There has been some argument that this representation is akin to the kind of representation made by a corporation in advertisements which assert facts about their own products; facts about themselves.[119] In situations where companies make false representations of fact about themselves, the company "can easily verify the veracity of its [own] statements."[120]

The Court has reasoned that the right to advertise is a type of freedom of speech, but that along with this right to advertise, there are rights of the recipient.[121] There is no reason why information cannot "flow cleanly as well as freely."[122] The Court does not ban claims against advertisers who are false or misleading.[123] Why now does it ban claims against persons who advertise falsely about themselves?[124]

In addition, there has been given more and more credence over the years to the practice of psychology and that vocation's ability to aid in law. There is a specific area in psychology that highlights the potential harm to actual award recipients that a person who lies about receiving an award can create.[125] Social cognition experiments have shown that "ordinary beliefs and preferences that operate without conscious intention, awareness, or

117. *See Alvarez*, 132 S. Ct. at 2560 (Alito, J., dissenting).

118. *Id.*

119. Mull, *supra* note 23, at 342.

120. *Id.* at 325.

121. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 757 (1976).

122. *Id.* at 772.

123. *See id.* at 771.

124. The Court in *Virginia Citizens Consumer Council* adds that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." *Id.*

125. *See* Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANNUAL REVIEW OF LAW & SOC. SCI 427, 427 (2007), *available at* http://www.annualreviews.org/doi/abs/10.1146/annurev.lawsocsci.3.081806.112748 ("Legal scholarship and judicial opinions are beginning to consider how the law can and should adapt to [psychological] findings, in particular how they call into question existing assumptions regarding the notion of intent, and their relevance for antidiscrimination law.").

control" can affect and in fact shape individual's thoughts and actions.[126] This implies that if a person, say an employer, learns that people are lying about being award recipients, or that a person who was thought to be an award recipient (but actually was not) does something unsordid, that employer could unconsciously be biased toward a legimitate recipient. This unconscious bias could have a real, direct effect on the actual recipient without anyone even knowing that it did.

Concious bias is also a problem. "[A] steady stream of stories in the media about the exposure of imposters would tend to increase skepticism among members of the public about the entire awards system. This would only exacerbate the harm that the Stolen Valor Act is meant to prevent."[127] Only adequate regulation backed by our court system can sufficiently hope to deter false claims and the negative secondary effects that they create.

In response to the Court's decision, the House of Representatives passed a revamped Stolen Valor Act.[128] The new bill focuses not on the people who lie about receiving military honors, but on the monetary profit made from lying about receiving them, thus amounting to criminal fraud.[129] This move in the House focuses the legal definition of "profit," in regards to being awarded military honors, to having only monetary aspects, and in a way, seeks to tarnish the reputation of those who have received such awards by putting a monetary value on their importance.[130] Furthermore, profiting from lying about receiving military decorations will be difficult to prove, since profits may be indirect (e.g., campaign contributions, promotions, and so forth).

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126. *Id.* at 428 ("Experimental psychology has provided substantial evidence that the human mind can operate in automatic, uncontrollable fashion as well as without conscious awareness of its workings and the sources of influence on it."). *Id.* at 427.

127. United States v. Alvarez, 132 S. Ct. 2537, 2560 (2012) (Alito, J., dissenting).

128. Stolen Valor Act of 2011, S. 1728, 112th Cong. (2012) (Senate text is the same as House of Representatives text), *available at* http://www.govtrack.us/congress/bills/112/s1728/text ("Offense- Whoever, with intent to obtain anything of value, knowingly makes a misrepresentation regarding his or her military service. . . . Defense- It is a defense to a prosecution under this section if the thing of value is de minimis." The punishments remain the same in this new version, except that serving in a combat zone or in a special operations force is grouped with the reception of the Congressional Medal of Honor.).

129. Larry Shaughnessy, *House passes revamped Stolen Valor Act*, CNN POLITICS (Sept. 13, 2012), http://www.cnn.com/2012/09/13/politics/stolen-valor-act/index.html.

130. *See* United States v. Alvarez, 132 S. Ct. 2537, 2560 (2012) (Alito, J., dissenting).

CONCLUSION

Throughout the majority's opinion in *Alvarez*, it is clear that Justice Kennedy is concerned about the slippery-slope phenomenon. If the type of speech proscribed by the Stolen Valor Act is found to be a constitutional act of Congress, then what is next, the Arts? The free flowing of ideas in the workplace to the extent that no new science is ever developed? The majority is concerned, and because of this genuine concern, views the Act as opening the door to an "endless list of subjects" that the Government could proscribe.[131] They fail to see how narrowly the Act is actually construed, and how only those who knowingly or recklessly put themselves in a position to be prosecuted under the law, can actually be prosecuted under the law. Congress, building on George Washington's views,[132] made the unauthorized wear of military awards criminal.[133] There has not been, in this country, any equivalent tradition concerning civilian awards and honors.[134] Similarly, the Stolen Valor Act does not extend to the civilian sector.

The majority also fails to consider what may come of the military award system and military honor recipients after their decision is rendered. What is to protect against this barrage of lying about our nation's most respected honors? There will be no deterrence to those who would manipulate the system to their own ends, monetarily or not. The majority thinks we should all rely on due diligence of one another to research whether a person has truly received an award. They rely heavily on the concept of making a Medal of Honor database. Increased accuracy of such a database might deter false Medal of Honor claims, but it would strike no blow to those that would lie about the Purple Heart or other lesser, yet still respected, military honors.

The Stolen Valor Act is a tool of deterrence. Making it a federal crime to make false claims could only hope to deter those who would seek to profit from claiming honors they did not receive. The majority, by ruling the Act unconstitutional, has effectively taken away the sharpest tool the Government has to stop the charlatans and to preserve the integrity of its military decorations.

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131. *Id.* at 2547 (majority opinion).

132. George Washington Papers, *supra* note 3.

133. United States v. Alvarez, 132 S. Ct. 2537, 2565 (2012) (Alito, J., dissenting).

134. *Id.* (listing popular civilian awards such as "Super Bowl rings, Oscars, or Phi Beta Kappa keys.").