STUDENT WORK

UNITED STATES v. ALVAREZ: ON THE FRONT LINE OF AMERICA'S SOUL-SEARCHING STRUGGLE BETWEEN MILITARY VALOR AND THE FIRST AMENDMENT

Gregory M. Ludtka*

> *We do not consecrate [an important national symbol] by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.*[1]

I. INTRODUCTION

For the moment, imagine three separate scenarios that illustrate the problem with the recently overturned Stolen Valor Act (SVA).[2] In the first scene, picture a young veteran—call him Corporal—who has just come back from the Iraq War and completed his term of service in the military. After acclimating back to life in the United States, Corporal was convinced by a neighbor to discuss his experience in the military at a high school assembly. Corporal obliges and—in the midst of his excitement and passion on stage, as he is encouraging students to stay in school and to live lives of service—exaggerates his service record by falsely claiming to have received a military honor. Corporal's aim is to illustrate to students that lives of service do not go unrecognized, but he chooses a less-than-honest way to convey his message. Corporal's statements are not part of a pattern of behavior; he

 Senior Associate, *Stetson Law Review*. J.D., Stetson University College of Law, 2012; B.A., Maryville College, 2008.

1. *Tex. v. Johnson*, 491 U.S. 397, 420 (1989).
2. 18 U.S.C. § 704(b)–(d) (2006).

simply made a bad decision in the heat of the moment. A school resource officer, present at the high school assembly, knows that Corporal has exaggerated his service record, and the government arrests and charges Corporal with violating the SVA.

In the second scene, picture Corporal out for a night on the town at a local bar. As Corporal surveys the bar scene, he spots a woman he would like to get to know better. In an effort to impress the woman, Corporal exaggerates his service record and claims to have received the Purple Heart for being wounded in battle. Unbeknownst to Corporal, a law enforcement officer overhears Corporal's conversation with the woman and knows the story is untrue. In this second scene, the government arrests and charges Corporal with violating the SVA, just like in the first scene.

In the final scene, picture Grandfather at home on babysitting duty with his three young grandchildren. Grandfather has always been one to embellish for the sake of telling a good story. One night he makes up a couple of old war stories that he tells his grandchildren while they are staying at his rural farmhouse, without a neighbor in sight. One of those war stories ends with Grandfather receiving the Congressional Medal of Honor. One grandchild repeats Grandfather's war story to the wrong person, and that young grandchild is forced to act as a government witness and send Grandfather to jail in a federal prosecution under the SVA.[3]

The question is: can the government constitutionally imprison people for making these false statements? In a general sense, this is the issue that the Supreme Court decided in its past term when it reviewed the Ninth Circuit's decision in *United States v. Alvarez*.[4] Ultimately, the Supreme Court held that the Stolen Valor Act violated the First Amendment.[5]

The relevant portion of the SVA provided:

> (b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS.—Whoever falsely represents himself or herself, verbally or in writing, to have been awarded

3. *See United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (plurality) (acknowledging that the SVA "would apply with equal force to personal, whispered conversations within a home").

4. 617 F.3d 1198, 1218 (9th Cir. 2010) (holding 18 U.S.C. Section 704(b) of the SVA facially unconstitutional).

5. *Alvarez*, 132 S. Ct. at 2551.

> any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.[6]

Under the SVA's plain language, there was no intent requirement and no harm requirement.[7] The statements criminalized by the SVA were bare falsehoods[8] in the truest sense.[9] This was really the crux of the SVA's problem: there was no requirement that any specific and identifiable harm occur to an individual or group of individuals before criminal and civil penalties could be levied against those accused of violating the statute.[10] Congress made words, and words alone, criminal.

In examining the Supreme Court's recent *United States v. Alvarez* decision and the problems posed by the duly overturned portions of the SVA, it is important to understand that the aim of this Article is not to address the SVA as a whole. Rather, this Article's commentary and analysis are limited to a discussion of Title 18 U.S.C. Section 704(b)–(d) (2006).[11] Additionally, this Article's primary purpose is not to evaluate the appropriate way to

---

6. 18 U.S.C. § 704(b). The enhancement provisions providing for up to one year of imprisonment for certain military honors and medals follow in subsequent sections. 18 U.S.C. § 704(c)–(d).

7. *Id.* at § 704(b)–(d).

8. In a country where people have been fined and imprisoned for making false statements about the receipt of various military honors and medals, it is increasingly important to understand what constitutes a falsehood. In a plain-language sense, "false" is defined as "not genuine[,]" "intentionally untrue[,]" "adjusted or made so as to deceive[,]" "tending to mislead[,]" "not true[,]" and "not faithful or loyal." *Merriam-Webster's Collegiate Dictionary* 450 (11th ed., Merriam-Webster 2007). These definitions are informative because they define the stakes of the legal debate over the SVA.

9. *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1188 (D. Colo. 2010) (referring to the behavior that the plain language of the SVA punishes: "[i]t is merely fraud in the air, untethered from any underlying crime at all"), *rev'd*, 667 F.3d 1146 (10th Cir. 2012).

10. *See* Pub. L. No. 109-437, § 2, 120 Stat. 3266, 3266 (2006) (making a bare finding that "[f]raudulent claims surrounding the receipt of the Medal of Honor, the distinguished-service cross, the Navy cross, the Air Force cross, the Purple Heart, and other decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals").

11. 18 U.S.C. Section 704(a) is not directed at mere falsehoods but rather solicitation, replication, or use of actual military uniforms and symbols. Therefore, this portion of the statute requires a separate analysis that is not within the scope of this Article.

interpret *Gertz v. Robert Welch, Inc.*,[12] although that case provides important context for evaluating the SVA.

This Article argues that the Supreme Court rightfully overturned the SVA by holding that it violated fundamental First Amendment values and significantly departed from previous appropriate legislation regulating truth and falsity. The SVA was a content-based restriction on speech,[13] and the speech regulated by the SVA was not a category of speech traditionally excepted from the strict scrutiny analysis used to evaluate content-based speech restrictions.[14] Therefore, the government needed to meet the highest burden to uphold the SVA.[15] Because the SVA was not narrowly tailored to achieve a compelling government interest, the government failed to meet its burden, and the Supreme Court overturned the SVA.[16] Rather than undertaking a formulaic approach to the SVA's constitutionality and the propriety of the *Alvarez* decision,[17] this Article focuses more closely on the impact that recent Supreme Court jurisprudence has on an analysis of the SVA. It also examines the SVA in light of previous government attempts to immunize its symbols from speech considered offensive[18]—an area discussed but underemphasized in *Alvarez*. Examining recent Supreme Court decisions and previous attempts to create a government monopoly on the use of the people's symbols reinforces the SVA's unconstitutionality.[19] This independent analysis underscores the appropriateness of the

12. 418 U.S. 323 (1974).

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. . . . But 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 339–340 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

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

14. *See id.* at 2544 (naming traditional exceptions to First Amendment protection and noting that there is no special exception for false statements of fact).

15. *Id.* at 2543.

16. *See id.* at 2551 (summarizing the plurality's position and identifying alternative, permissible solutions to the problem that the government seeks to address).

17. *E.g.* 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 (2012); Julia K. Wood, Student Author, *Truth, Lies, and Stolen Valor: A Case for Protecting False Statements of Fact under the First Amendment*, 61 Duke L.J. 469, 491 (2011).

18. *See infra* pt. III (examining three cases where the government attempted to monopolize symbols of American patriotism).

19. *Infra* pt. III.

Alvarez decision, expands upon it, and in some cases disagrees with *Alvarez*'s reasoning.

In place of the SVA, there are a number of proactive options for those who are concerned about the honor and integrity of those who have sacrificed so much to contribute to the health, well-being, freedom, and opportunity enjoyed by so many American citizens. For example, the government can create an open database that discloses the true recipients of military honors and medals.[20] In addition, private citizens can actively engage in monitoring the integrity of military honors and medals by expanding current efforts to find and expose those who lie about their service to the United States military.[21] Both of these solutions are "more speech" solutions and not "less speech" solutions, and that is the goal of this Article. After all, as Justice Brandeis said, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[22] While the Supreme Court did discuss many of these "more speech" solutions, the Court did not explicitly identify one piece of federal legislation, already drafted, that can serve as a model for future SVA legislation.[23]

Part II of this Article introduces the background behind the SVA and summarizes *Alvarez*'s reasoning. Part III analyzes the SVA in light of the current trend of the Supreme Court and fundamental First Amendment values, and deconstructs the idea that good intentions save a bad statute from being unconstitutional. Additionally, Part III disagrees with the Supreme Court's reading of the SVA's scope and proposes a more plain-language reading of the SVA that underscores its dangerous breadth. Part III reinforces the notion that liberty must always come before symbolism. Part IV proposes government and nongovernment alternatives to the SVA. Finally, Part V emphasizes that "more

20. *See infra* pt. IV(A) (discussing the role the government can play in addressing the problem of "stolen valor"); *see also* Julie Hilden, *Litigating the Stolen Valor Act: Do False Claims of Heroism in Battle Harm Genuine Heroes?* http://writ.news.findlaw.com/hilden/20101122.html (Nov. 22, 2010) (discussing the possibility of a "consolidated, searchable online government database of the names and ages of all true U.S. medal recipients").

21. *See e.g.* Stolen Valor, *Poser Busting*, http://stolenvalor.com/poser.cfm (accessed Apr. 2, 2013) (discussing a method for finding and outing a military "poser").

22. *Johnson*, 491 U.S. at 419 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

23. H.R. 666, 111th Cong. §§ 1–2 (Jan. 23, 2009).

speech" solutions, not "less speech" solutions, are the best way to uphold fundamental First Amendment values.

II. BACKGROUND OF THE SVA

The most recent version of the SVA was passed in 2006, during the second Bush administration, with the intended purpose of protecting the dignity of military honors and medals.[24] The actual prevalence of individuals falsely claiming to receive military honors and medals is difficult to quantify, but "[i]n 2009, the Federal Bureau of Investigation (FBI) investigated approximately [two hundred] cases involving 'stolen valor.'"[25] Regardless of the actual number of military fakers, it is true that a small segment of the population does use false claims about their military service record to garner respect, feed their own ego, or acquire some benefit, whether it be intangible or tangible.[26] For example, many people know the story of Mount Holyoke history professor Joseph Ellis, who received attention in the early 2000s for allegedly deceiving students about his service in Vietnam.[27] Students interviewed about the story stated that Professor Ellis would liven his lectures with "vivid descriptions of his Army service in Southeast

24. *See* Pub. L. No. 109-437, § 2 (finding that false claims damage the meaning of military honors and medals). There are a number of good sources that discuss some of the factual context for this legislation. *See e.g.* Michael J. Davidson, *Bits of Ribbon and Stolen Valor*, 58 Fed. Law. 20, 21–24 (2011) (providing a summary of issues surrounding the SVA). The Congressional Record of the SVA also contains an interesting reference to early American legislation aimed at preventing false claims of valor. 152 Cong. Rec. H8819–H8823 (2006). The Record summarizes the previous legislation as follows:

> [T]he Stolen Valor Act of 2005 restores a precedent established by General George Washington. This was when he first instituted our first individual military award in 1782. In his General Orders issued from his headquarters in Newburg, New York, on August 7, 1782, General Washington established the Badge for Military Merit, which in 1932 was revised as the Purple Heart. General Washington noted the following point with regard to military awards: "Should any who are not entitled to these honors have the insolence to assume the badges of them, they shall be severely punished."

Id. at H8221. For more historical information about the First Amendment, see *The Founders' Constitution: Amendments I–XII* vol. 5 (Philip B. Kurland & Ralph Lerner eds., U. Chi. Press 1987) (containing a number of early American sources that discuss issues related to the First Amendment).

25. Davidson, *supra* n. 24, at 20.

26. *Id.*

27. Elizabeth Mehren, *College Suspends Professor: Academia: Mount Holyoke Penalizes Famed Historian Who Admitted Lying to Students about Serving in Vietnam*, L.A. Times, http://articles.latimes.com/2001/aug/18/news/mn-35538 (Aug. 18, 2001) (occurring before the passage of the SVA).

Asia."[28] The problem was that he reportedly never went overseas.[29]

Because Professor Ellis is a successful, respected man, the allegations against him provide a great example of the intangible and difficult-to-understand motivations that compel some people to misrepresent their military service record.[30] Additionally, although the allegations against Professor Ellis do not appear to fall under the purview of the SVA, they illustrate the general genre of problem the SVA sought to address—people who deceive others about valorous military service.[31]

A. *United States v. Alvarez* and a Sampling of the World of SVA Cases

Alvarez's long legal journey received a jumpstart in June 2007 when he stood up at a water district meeting, introduced himself as a Congressional Medal of Honor recipient, and claimed to have been wounded in battle.[32] Alvarez's statements were recorded and turned over to the FBI, resulting in a lengthy court battle.[33] Apparently, on the night of the water district meeting, Alvarez was doing something that he was quite familiar with—telling stories.[34] Reports reveal that he claimed to have rescued "the American Ambassador during the Iranian hostage crisis," that he "claimed to have played hockey for the Detroit Red

---

28. *Id.*

29. *Id.*

30. *See id.* (describing Professor Ellis' career as distinguished). Professor Ellis reportedly stated, "'By misrepresenting my military service to the students in the course on the Vietnam War, I did something both stupid and wrong . . . . I apologize . . . for violating the implicit covenant of trust that must exist in the classroom.'" *Id.*

31. Senate candidate Mike McCalister is another example of someone accused of exaggerating his military service record. Marc Caputo, *Senate Candidate Mike McCalister Breaks Army Rules, Wears Uniform to Fundraiser*, Tampa Bay Times, http://www.tampabay.com/news/military/macdill/senate-candidate-mike-mccalister-breaks-army-rules-wears-uniform-to/1188158 (posted Aug. 26, 2011, 1:51 p.m.).

> McCalister has repeatedly said he was involved in "black ops" and has seen "scary things." But he never served in combat and was really a "paper pusher," said Jeffrey Shera, a former sergeant major who served in Special Forces. Shera said he worked with McCalister from about 2001 to 2003.

Id.

32. *Alvarez*, 617 F.3d at 1200.

33. *Id.* at 1201.

34. The Supreme Court stated that "[l]ying was [Alvarez's] habit." *Alvarez*, 132 S. Ct. at 2542.

Wings," and that he had "been secretly married to a Mexican starlet."[35] None of the stories had any truth to them.[36]

Alvarez eventually pled guilty to violating the SVA, and "[h]e was sentenced to pay a $100 special assessment and a $5,000 fine, to serve three years of probation, and to perform 416 hours of community service."[37] On appeal, Alvarez successfully challenged the SVA's constitutionality under the First Amendment,[38] claiming that the SVA was both facially invalid and invalid as applied.[39] Reversing Alvarez's conviction, the United States Court of Appeals for the Ninth Circuit stated that speech is presumptively protected under the First Amendment, a mere falsehood is not a traditional exception to First Amendment protection, and the SVA "is not narrowly drawn to achieve a compelling governmental interest[ ] and is unconstitutional."[40]

In rendering this decision, the court engaged in a careful analysis of a number of important issues that provide an excellent springboard for the coming conversation. The court began its discussion of the constitutionality of the SVA by pointing out that the SVA is a content-based speech restriction.[41] Generally, content-based speech restrictions are subject to strict scrutiny,[42] unless they fall into one of the historical, narrowly defined categories of speech that do not receive the default presumption of First

35. *Alvarez*, 617 F.3d at 1201.

36. *Id.*

37. *Id.*

38. The First Amendment mandates, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

39. *Alvarez*, 617 F.3d at 1201. A facial challenge requires the challenging party to prove either "'that no set of circumstances exists under which [the Act] would be valid'" or "'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010). In contrast, under an as-applied challenge, "the constitutionality of a statute is evaluated considering how it operates in practice against the particular litigant and under the facts of the instant case, not hypothetical facts in other situations." 16 C.J.S. *Constitutional Law* § 187 (2005) (footnotes omitted) (citing *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Compen. Comm'n*, 74 S.W.3d 377 (Tex. 2002)).

40. *Alvarez*, 617 F.3d at 1218.

41. *Id.* at 1202.

42. *Id.* at 1216 (explaining that "[t]he strict scrutiny standard of review is familiar: the government must show that the law is narrowly tailored to achieve a compelling governmental interest") (citing *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010). The court also noted that "[a] law is not narrowly tailored when less speech-restrictive means exist to achieve the interest." *Id.*

Amendment protection.[43] These categories include "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct."[44] The government's position was that these traditionally exempt categories also include "false statements of fact."[45] For this particular proposition, the government relied on *Gertz*.[46]

In considering whether *Gertz* stands for the proposition that false statements of fact are not protected by the First Amendment, the court warned against reading statements by the Supreme Court in isolation.[47] The court further cautioned that some falsehoods must be protected[48] to preserve the necessary breathing space required by open, robust debate, and it cited to other statements in *Gertz* that conflict with the government's broad reading (the presumption that false statements of fact are not protected by the First Amendment).[49] In response to the government's position, the court quoted from *New York Times Co. v. Sullivan*[50] and stated that an "[e]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the breathing space that they need to survive."[51] Therefore, the court rejected the notion that falsehoods are exempt from First Amendment protection.[52]

---

43. *Id.* at 1215–1216.

44. *Id.* at 1202 (quoting *Stevens*, 130 S. Ct. at 1584).

45. *Id.* at 1202–1203 (citing *Gertz*, 418 U.S. at 340).

46. *Id.* at 1202.

47. *Id.* at 1203.

48. *See* Wood, *supra* n. 17, at 491. Even if the court were to assume

> that false statements of fact have no inherent value, there are still compelling reasons to protect false statements that are not defamatory or fraudulent. These reasons generally fall into two categories. The first category comprises liberty concerns, which include avoiding setting up the government as an arbiter of truth, promoting privacy and autonomy, and protecting other valuable speech. The second category contains pragmatic concerns, which include avoiding the difficulty of separating truth from fiction and facts from opinions, and promoting ease of administration.

Id.

49. *Alvarez*, 617 F.3d at 1203 (citing *Gertz*, 418 U.S. at 341) (stating that "the 'First Amendment requires that we protect some falsehood in order to protect speech that matters'").

50. 376 U.S. 254 (1964).

51. *Alvarez*, 617 F.3d at 1203 (quoting *N.Y. Times Co.*, 376 U.S. at 271–272) (emphasis omitted).

52. *Id.* at 1204. The court warned that there were at least two broad problems with the government's approach to false statements and the First Amendment. *Id.*

> First, under the government's proposed approach, it would effectively become the speaker's burden to prove that his [or her] false statement should be protected from criminal prosecution. . . . Second, the government's approach would give it

After rejecting the notion that the First Amendment does not protect falsehoods, the Ninth Circuit compared the prohibitions codified by the SVA to traditional, limited exceptions to First Amendment protection.[53] The court dismissed the idea that speech prohibited by the SVA is analogous to defamation,[54] fraud,[55] or speech integral to criminal conduct.[56] For example, the court noted that

> [e]ven laws about perjury or fraudulent administrative filings—arguably the purest regulations of false statements of fact—require at a minimum that the misrepresentation be willful, material, and uttered under circumstances in which the misrepresentation is designed to cause an injury, either to the proper functioning of government . . . or to the government's or a private person's economic interests. . . . [F]alsity alone is not enough. The context must be well-defined.[57]

With this background established, the court subjected the SVA to strict scrutiny analysis and found that the SVA failed to meet this rigorous standard because other, less speech-restrictive means of achieving the government's interest were available.[58]

> license to interfere significantly with our private and public conversations. Placing the presumption in favor of regulation, as the government and dissent's proposed rule does, would steadily undermine the foundations of the First Amendment.

Id.

53. *Id.* at 1206.

54. "The Court has never held that a person can be liable for defamation merely for spreading knowingly false statements. The speech must also be 'injurious to a private individual.'" *Id.* at 1209 (quoting *Gertz*, 418 U.S. at 347).

55. *Id.* at 1211–1212.

56. *Id.* at 1212–1213.

57. *Id.* at 1211–1212.

58. *Id.* at 1210. The Congressional Medal of Honor Society and the Congressional Medal of Honor Foundation are examples of how the government can err on the side of more speech, not less. *Id.* at n. 11. It should be reiterated here that the court's holding only applied to 18 U.S.C. Section 704(b) and the relevant enhancement provisions—not to 18 U.S.C. Section 704(a). *See supra* n. 11 and accompanying text (explaining that the provisions of 704(a) fall outside the scope of this Article). When 18 U.S.C. Section 704(a) was subsequently considered, the Ninth Circuit declined to find this provision of the SVA unconstitutionally overbroad. *United States v. Perelman*, 658 F.3d 1134, 1137 (2011). "By prohibiting the wearing of a colorable imitation and by including a scienter requirement, Congress made clear that deception was its targeted harm. . . . Defendant's facial overbreadth challenge fails" because the examples listed by the defendant were excluded by the intent requirement in the statute. *Id.* In the court's response to the defendant's insistence that *Alvarez* requires a finding that 18 U.S.C. Section 704(a) is unconstitutional, the court stated that there are important differences between 18 U.S.C. Section 704(a) and 18 U.S.C. Section 704(b). *Id.* at 1138. Specifically, 18 U.S.C. Section 704(a)'s mental require-

The court pointed out that falsity, exaggeration, and the absurd can be useful tools in the journey toward uncovering an otherwise elusive truth.[59]

1. United States v. Robbins*: The Other Side of the Coin*

The Ninth Circuit's *Alvarez* decision stood in direct conflict with a later decision by the United States District Court for the Western District of Virginia in *United States v. Robbins*,[60] which held that the SVA was constitutional.[61] In *Robbins*, the court considered whether the SVA was constitutional following a grand-jury indictment of an individual accused of falsely representing his service record.[62] Again, the court's interpretation of *Gertz* provided a critical tipping point for evaluating the criminalization of mere falsehoods.[63] The court stated that *Gertz* is properly read as holding that falsehoods are a general exception to First Amendment protection because they are "not 'speech that matters.'"[64]

---

ment provides a context for the statutory provision that permissibly limits the symbolic speech to which it might apply. *Id.* Additionally, the court said that criminalizing pure speech is a more troubling infringement on the First Amendment than criminalizing certain types of expressive conduct "because they contain elements 'that assure[ ] us [that] the law targets legitimately criminal conduct.'" *Id.* at 1139 (quoting *Alvarez*, 617 F.3d at 1213).

59. The court also pointed out that political and artistic speech may require the use of calculated false statements, mentioning examples "such as The Onion, The Daily Show, and The Colbert Report." *Alvarez*, 617 F.3d at 1213. "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Stevens*, 130 S. Ct. at 1585. This decision is also in accord with the holding of the United States District Court for the District of Colorado. *Strandlof*, 746 F. Supp. 2d at 1183–1184 (finding the SVA facially invalid).

60. *United States v. Robbins*, 759 F. Supp. 2d 815 (W.D. Va. 2011), *vacated in part and aff'd in part*, 2012 WL 4017432 (4th Cir. Sept. 13, 2013).

61. *Robbins*, 759 F. Supp. 2d at 816.

62. *Id.*

63. *Id.* at 817–818. The court, however, was forced to acknowledge that "the declaration in *Gertz* was made without citation and was recognized as dicta by the Supreme Court." *Id.* at 818. The court declined to read *Gertz* as limited to a very narrowly defined context not applicable in the case at hand. *Id.*

64. *Id.* at 819; *but see Stevens*, 130 S. Ct. at 1585 (stating that "[t]he Government . . . proposes that a claim of categorical exclusion should be considered under a simple balancing test," which "is startling and dangerous"). The "speech that matters" language so casually used by the *Robbins* opinion in so sensitive a setting has the same scary undertones of an ad hoc balancing test—a test rejected by the Supreme Court in *Stevens*. 130 S. Ct. at 1585 (explaining further the Court's reasoning behind dismissing an ad hoc balancing test). Admittedly, "[m]aybe there are some categories of speech that have been historically unprotected, but have not been specifically identified or discussed as such in our

After making a determination that *Gertz* generally excludes falsehoods from First Amendment protection, the court used what it considered an appropriate rule of statutory construction by reading into Section 704(b) of the SVA a knowledge requirement and a *mens rea* requirement.[65] Finding that the knowledge and *mens rea* requirements sufficiently limited the potential dangers of the SVA, the court upheld the statute's constitutionality.[66] The *Robbins* court also dismissed the Ninth Circuit's concerns, stating that "as interpreted [the SVA] is unlikely to have a chilling effect on legitimate speech. The statements at issue are made about oneself and are easily verifiable using objective means."[67] Finally, the court ignored a big question when it stated that "[t]he constitutionality of lying about . . . private matters is not the question in this case."[68] Thus, the court sidestepped some of the concerns expressed in *Alvarez*.[69]

The knowledge and intent requirements, read into the SVA by the *Robbins* court, cannot be emphasized enough. In many ways, by reading these requirements into the SVA, the *Robbins* court considered a statute—a judicially amended statute that does not reflect the plain language of the SVA—that was completely different than the statute considered in *Alvarez*. This, combined with *Robbins* court's interpretation of *Gertz*, played a critical role in the court coming to a different holding than the Ninth Circuit's holding in *Alvarez*.

2. United States v. Strandlof*: A Conflicting Opinion from the Tenth Circuit*

Before the Supreme Court's own decision, the constitutionality of the SVA was most recently considered by the Tenth Circuit—in an opinion reversing the holding of the United States

[caselaw]." *Id.* at 1586. This Article agrees with the Supreme Court that false statements of fact are not one of those categories, and *Stevens* supports this notion. *Id.* at 1584 (listing a limited number of categories of speech completely outside the First Amendment).

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

66. *Id.* at 822.

67. *Id.* at 820.

68. *Id.* at 821.

69. 617 F.3d at 1200 (expressing concern that "there would be no constitutional bar to criminalizing lying about one's height, weight, age, or financial status on Match.com or Facebook, or falsely representing to one's mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving").

District Court for the District of Colorado—finding the SVA constitutional in *United States v. Strandlof*.[70] The Tenth Circuit took a similar approach to the district court in *Robbins*[71] and read an intent requirement into the SVA.[72] The latest *Strandlof* decision also read an exceptions clause into the SVA, stating that the SVA "does not criminalize any satirical, rhetorical, theatrical, literary, ironic, or hyperbolic statements that qualify as protected speech."[73] Notably, both the Tenth Circuit's intent requirement and the Tenth Circuit's exceptions clause do not appear anywhere on the face of the SVA.[74] Finally, the *Strandlof* court declined to subject the SVA to strict scrutiny analysis and instead applied a self-constructed, three-part test, asking whether the statute (1) "punishes only *knowingly* false statements," (2) "leaves adequate 'breathing space' for truthful and other fully protected speech," and (3) "reaches no further than necessary to protect the government's legitimate interest."[75] In its analysis, the *Strandlof* court conflated pure false speech with other categories of historically unprotected speech such as fraud and defamation.[76] Applying its own unique test, the Tenth Circuit found the SVA constitutional.[77]

B. Touching on *Gertz* and Its Impact on the Constitutional Protection of Falsehoods

In *Gertz*, the Supreme Court held that a publisher who makes defamatory statements about an individual who is not a public figure cannot use the *New York Times Co.* standard to protect himself or herself from liability.[78] The *New York Times Co.*

70. *United States v. Strandlof*, 667 F.3d 1146 (10th Cir. 2012).
71. 759 F. Supp. 2d at 819.
72. *Strandlof*, 667 F.3d at 1155.
73. *Id.*
74. 18 U.S.C. § 704(b)–(d).
75. *Strandlof*, 667 F.3d at 1160.
76. *Id.* at 1158, 1161 (discussing the framework surrounding "states' abilities to punish defamatory falsehoods" and mentioning fraud, perjury, and "falsehoods likely to provoke public panic" as being the same as speech criminalized by the SVA).
77. *Id.* at 1167. The court noted that at the time there was one SVA-related case pending in the Eighth Circuit and one pending in the Eleventh Circuit. *Id.* at 1153 (citing *United States v. Kepler*, 2011 WL 8202542 (S.D. Iowa May 31, 2011); *United States v. Amster*, 2012 WL 2756007 (11th Cir. July 10, 2012), cert. denied, 2012 WL 4929886 (U.S. Nov. 13, 2012)).
78. *See generally Gertz*, 418 U.S. 323 (holding that the *New York Times* standard is irrelevant to this case).

standard requires a showing of knowledge of falsehood or reckless disregard of the truth before a publisher can be held legally liable for false statements made about a public figure that result in damage to that individual.[79]

Some courts have drawn out specific language from the *Gertz* decision to support the position that falsehoods, in general, are not protected by the First Amendment.[80] For example,

> 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. . . .[81] They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[82]

It is important that these statements, written in dicta, not be removed from their inseparable context. To reiterate, the Court made these statements while discussing the possible liability of publishers who make defamatory statements about private individuals that turn out to be false.[83] The Court has previously cautioned against taking isolated statements out of context and applying them as stand-alone rules of law.[84] It is important that readers not misapply this short excerpt from *Gertz* in the same way—especially when something as fundamental as free speech is at stake.[85]

---

79. *Id.* at 342.

80. *See e.g. supra* n. 49 and accompanying text (discussing *Alvarez* and *Gertz*).

81. *Gertz*, 418 U.S. at 340 (quoting *N.Y. Times Co.*, 376 U.S. at 270) (internal quotation marks omitted).

82. *Id.* at 340 (quoting *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942)).

83. *Id.* at 325 (stating that "[w]e granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen").

84. *See Stevens*, 130 S. Ct. at 1586 (rejecting the government's position while acknowledging that the government's position arose from the misapplication of a quote from previous Supreme Court precedent).

85. *See Robbins*, 759 F. Supp. 2d at 818 (noting that "the declaration in *Gertz* was made without citation and was recognized as dicta by the Supreme Court").

C. Laws Analogous to the SVA

The SVA is not the only piece of legislation that aimed to criminalize false statements.[86] For example, California's legislature enacted SVA-like legislation with its own varying provisions.[87] Additionally, the House of Representatives recently passed The Stolen Valor Act of 2012.[88] The Stolen Valor Act of 2012 modifies the language of the former SVA by adding the requirement that the concerned falsehoods be made intentionally to obtain "money, property, or other tangible benefit."[89] The legislature is moving in the right direction by requiring that falsehoods falling under the purview of The Stolen Valor Act of 2012 be made to obtain "a tangible benefit"; another positive step would be to put a finer point on the potentially vague "tangible benefit" language.

Moreover, the United States is not the only nation making an attempt to regulate pure speech. For example, some European laws make Holocaust denial a crime.[90] Apparently, creative minds all over the world are inventing new ways to punish people for saying things that are offensive or disagreeable.[91]

---

86. For an example of another troubling federal law that has the potential to overstep the bounds of good practice and common sense, see Orin S. Kerr, *Should Faking a Name on Facebook Be a Felony? Congress Contemplates Draconian Punishment for Internet Lies*, Wall St. J., http://online.wsj.com/article/SB10001424053111903285704576562294116160896.html (posted Sept. 14, 2011, 8:15 p.m. ET) (discussing the Computer Fraud and Abuse Act). "In 2009, the Justice Department prosecuted a woman for violating the 'terms of service' of the social networking site MySpace.com. The woman had been part of a group that set up a MySpace profile using a fake picture." *Id.*

87. *See* Farid Sharaby, *Chapter 93: Expanding the Stolen Valor Act within California*, 41 McGeorge L. Rev. 619 (2010) (discussing several California state laws and mentioning the *Alvarez* case).

88. H.R. 1775, 112th Cong. (Sept. 13, 2012) (available at http://www.gpo.gov/fdsys/pkg/BILLS-112hr1775eh/pdf/BILLS-112hr1775eh.pdf).

89. *Id.* at § 704(2)(b).

90. Smith, *supra* n. 17, at 803.

91. *See e.g. Sebastian Abbot, Pakistan Bans 'Obscene' Words on Cell Phone Texts*, http://news.yahoo.com/pakistan-bans-obscene-words-cell-phone-texts-122933488.html (Nov. 18, 2011) (explaining that Pakistan issued an order to telecommunications companies to block text messages containing certain words that it deemed obscene). The letter from the telecommunications authority stated that "the order was legal under a 1996 law preventing people from sending information through the telecommunications system that is 'false, fabricated, indecent[,] or obscene,'" but "[t]he reasons for blocking some words, including Jesus Christ, headlights[,] and tampon, were less clear, raising questions about religious freedom and practicality." *Id.* "[The letter] also stated that free speech can be restricted 'in the interest of the glory of Islam.'" *Id.* Further, "[l]ast year, [Pakistan] temporarily banned Facebook because of material on the site deemed offensive to Islam." *Id.*

D. The Supreme Court's Approach to the SVA

The Supreme Court ultimately agreed with the Ninth Circuit and held the SVA unconstitutional in a plurality opinion.[92] Four justices joined in the plurality opinion, two justices concurred, and three justices dissented.[93] The factions present in the *United States v. Alvarez* decision accentuate the controversial and difficult nature of this decision.

Writing for the plurality, Justice Anthony M. Kennedy began his analysis of the SVA by acknowledging the legitimate interest the SVA is intended to protect[94] while insisting that "the sometimes inconvenient principles of the First Amendment"[95] still applied. The plurality found that the SVA was a content-based speech restriction subject to strict scrutiny,[96] and the plurality stated that content-based speech restrictions are presumptively invalid.[97]

The plurality pointed to the limited categories of speech historically excluded from First Amendment protection and noted that a general exception for false statements was wholly absent.[98] Despite the government's insistence that the type of falsehood prohibited under the SVA was valueless, the plurality stated that falsehood is inevitable in open and robust debate.[99]

The plurality addressed some of the government's primary examples of permissibly prohibited falsehoods—false statements to government officials, perjury, and "the false representation that one is speaking as a Government official or on behalf of the Government"[100]—and distinguished each of them by stating that the SVA punished falsehood alone.[101] For each of the government's examples, the plurality discussed specific and identifiable harms that each law sought to prevent.[102] The plurality contrasted these examples with the SVA and noted the absence of

92. *Alvarez*, 132 S. Ct. at 2551.
93. *Id.* at 2537.
94. *Id.* at 2543.
95. *Id.*
96. *Id.*
97. *Id.* at 2543–2544.
98. *Id.* at 2544.
99. *Id.*
100. *Id.* at 2545–2546.
101. *Id.* at 2547.
102. *Id.* at 2543, 2549.

any established link between lies about military valor and a legally recognized harm.[103] Moreover, the plurality refused to create a new exception to First Amendment protection for falsehoods alone.[104]

Moving on to what the plurality considered to be the unacceptable consequences of the SVA, the plurality noted the sheer breadth of the SVA, which "by its plain terms applie[d] to a false statement made at any time, in any place, to any person."[105] The plurality insisted that true statements counteracting false claims of military valor are a far more appropriate solution than the relevant portions of the SVA.[106] The plurality found that the government failed to meet its burden of providing a causal link between a negative public perception of military awards and lies about military valor.[107] Finally, the plurality concluded that the government failed to demonstrate the inadequacy of counterspeech and held the SVA unconstitutional.[108]

In a concurring opinion written by Justice Stephen G. Breyer, two justices disagreed with the plurality's decision to subject the SVA to strict scrutiny.[109] Instead, the concurrence argued that intermediate scrutiny was the more appropriate standard.[110] In support of its position that the SVA should be subject to intermediate scrutiny, the concurrence distinguished the speech regulated by the SVA—classifying it as "false statements about easily verifiable facts"[111]—from "[l]aws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like."[112] The concurrence suggested that speech regulated by the SVA was not valuable enough to require strict scrutiny but still noted that false statements must enjoy some constitutional

103. *Id.*
104. *Id.* at 2546–2547.
105. *Id.* at 2547.
106. *Id.* at 2550.
107. *Id.* (Breyer & Kagan, JJ., concurring).
108. *Id.* at 2551.
109. *Id.*
110. *Id.*
111. *Id.* at 2552.
112. *Id.* The concurrence narrowed the scope of the SVA from its plain language by citing to a case mentioning "'background rules of the common law,'" which require crimes to have a certain *mens rea*. *Id.* at 2553 (citing *Staples v. United States*, 511 U.S. 600, 605 (1994)).

protection because they serve a valuable social purpose, in the right context.[113]

In its own assessment, the concurrence still found that the SVA was overly broad and failed to pass intermediate scrutiny.[114] The concurrence was concerned that the SVA did not include a limiting feature narrowing its application to situations where harm was likely to occur because of the lies told.[115] Trademark laws, according to the concurrence, are most similar to the SVA in purpose.[116] Trademark laws are distinguishably limited in scope because they "are focused upon commercial and promotional activities that are likely to dilute the value of a mark" and "typically require a showing of likely confusion, a showing that tends to assure that the feared harm will in fact take place."[117] The concurrence ended its analysis by finding that less speech-restrictive means of accomplishing the government's objective were available and therefore agreed with the plurality.[118]

The dissent, written by Justice Alito, started by asserting that the SVA only covered valueless speech and did not cause a constitutionally recognizable chill.[119] Five primary limitations, according to the dissent, worked together to make the SVA a constitutional statute.[120] In the dissent's view, the SVA only covered easily verifiable facts within the personal knowledge of the speaker that are intentionally misrepresented outside of the context of highly sensitive speech categories and without regard to the speaker's point of view.[121] The dissent also recognized that the SVA was part of a long-standing tradition protecting military awards.[122]

Latching onto the concurrence's discussion of trademark law, the dissent passionately argued that "it was reasonable for Congress to conclude that the goal of preserving the integrity of our country's top military honors is at least as worthy as that of protecting the prestige associated with fancy watches and designer

113. *Id.*
114. *Id.* at 2556 (Alito, Scalia & Thomas, JJ., dissenting).
115. *Id.* at 2555 (Breyer & Kagan, JJ., concurring).
116. *Id.* at 2554.
117. *Id.*
118. *Id.* at 2556.
119. *Id.* at 2556–2557 (Alito, Scalia & Thomas, JJ., dissenting).
120. *Id.* at 2557.
121. *Id.*
122. *Id.*

handbags."[123] The dissent made this statement, however, without undergoing a deep analysis of the concurrence's trademark law example.[124] The dissent concluded its argument by asserting the impracticality of alternative solutions to the SVA and stating that false statements should enjoy no First Amendment protection except where their prohibition would chill other valuable speech.[125]

III. EXAMINING PURE FALSE SPEECH: AN ANALYSIS OF RECENT PRECEDENT AND PREVIOUS GOVERNMENT ATTEMPTS TO MONOPOLIZE SYMBOLS OF AMERICAN PATRIOTISM SUPPORTS THE VERDICT IN UNITED STATES v. ALVAREZ

The SVA struck at the very heart of the First Amendment by making respect for something as praiseworthy as selfless military valor an accidental Trojan horse for the erosion of fundamental freedoms guaranteed by the First Amendment. It bears reminding what the words of the First Amendment guarantee:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[126]

While subsequent jurisprudence has made it clear that the First Amendment is not applied with the degree of force, simplicity, and clarity with which it first resounds, the presumption still remains, based on the plain language of the First Amendment, that the government cannot regulate speech.[127] Hanging below

123. *Id.* at 2559.

124. *Id.* Deep analysis aside, this argument provides a powerful emotional element to the dissent's opinion that is hard to ignore.

125. *Id.* at 2559–2560, 2563.

126. U.S. Const. amend. I.

127. *Alvarez*, 617 F.3d at 1205.

> [W]e presumptively protect *all* speech against government interference, leaving it to the government to demonstrate, either through a well-crafted statute or case-specific application, the historical basis for or a compelling need to remove some speech from protection (in this case, for some reason other than the mere fact that it is a lie).

Id. (emphasis in original).

this banner of protection are a series of dangling exceptions that define narrow areas previously carved out by the courts as unworthy of the First Amendment's protection.[128] Where speech does not fall into one of these narrowly defined categories, laws restricting that speech are subject to strict scrutiny[129]—a rigorous analysis often resulting in careless, dangerous, and otherwise poorly drafted laws being overturned.[130] The SVA did not fit into any of these previously recognized exceptions.[131]

By examining the recent trend of the Supreme Court and exploring fundamental principles enshrined in First Amendment jurisprudence, this Part argues that the Supreme Court was correct in declaring the SVA an unconstitutional, dangerous law. Admittedly, the SVA was rooted in a worthy goal—respect for those who serve with honor in the military—but this goal is of secondary importance to the fundamental rights for which so many military men and women have died.[132] Multitudes of military service members sacrifice their lives on the field of battle not for a medal or a ribbon that is beyond reproach;[133] they suffer and die to protect a set of fundamental values too ambitious and lofty to be molded into a medallion or woven into a piece of fabric. At the heart of these fundamental American freedoms is the First Amendment's guarantee of the exercise of free speech, and it should not be eroded in the name of any secondary cause, no matter how worthy. Additionally, to adopt the words of the United States District Court for the District of Colorado, "I have profound faith—a faith that appears to be questioned by the gov-

128. These categories include "obscenity, . . . defamation, . . . fraud, . . . incitement, . . . and speech integral to criminal conduct." *Stevens*, 130 S. Ct. at 1584 (citations omitted).

129. *Alvarez*, 617 F.3d at 1215.

130. *See Alvarez*, 132 S. Ct. at 2552 (Breyer & Kagan, JJ., concurring) (noting strict scrutiny analysis warrants "near-automatic condemnation").

131. *See Stevens*, 130 S. Ct. at 1584 (listing the limited exceptions to First Amendment protection).

132. *See Alvarez*, 132 S. Ct. at 2543 (plurality) (stating that even where legitimate and "valued national aspiration" is concerned, the government must adhere to basic constitutional requirements when addressing a problem).

133. *Alvarez*, 617 F.3d at 1217 (quoting *Strandlof*, 746 F. Supp. 2d at 1190).

> [W]e agree with the reasoning of the District Court of Colorado that suggesting "that the battlefield heroism of our servicemen and women is motivated in any way . . . by considerations of whether a medal may be awarded simply defies . . . comprehension" and is "unintentionally insulting to the profound sacrifices of military personnel the Stolen Valor Act purports to honor."

Id.

ernment here—that the reputation, honor, and dignity military decorations embody are not so tenuous or ephemeral as to be erased by the mere utterance of a false claim of entitlement."[134]

A. The Supreme Court Has Wisely Been Trending toward the Invalidation of Statutes That Threaten Free Speech—Even When Those Statutes Are Enacted with the Best of Intentions

There are several recent decisions by the Supreme Court that demonstrate a commendable, albeit sometimes controversial, fidelity to protecting free speech. Three Supreme Court cases exemplify the Court's willingness to strike down laws that serve an admirable purpose but appear to threaten the ability of people to speak without fear: *Brown v. Entertainment Merchants Ass'n*,[135] *United States v. Stevens*,[136] and *Citizens United v. Federal Election Commission*.[137] One of the underlying messages of these cases is that even the best intentions[138] cannot in and of themselves justify departing from basic constitutional requirements. The judiciary is an important stopgap to prevent those bad results. This is a lesson that is applicable when evaluating the SVA. These cases also emphasize that the current climate in the Supreme Court is one of fidelity to fundamental First Amendment values. Fortunately, this climate of fidelity to important national principles continues to shine through even where emotionally charged and politically sensitive issues are concerned, as evidenced by the *Alvarez* decision.[139]

1. Brown v. Entertainment Merchants Association

In *Brown*, the Court considered whether a California statute restricting the sale of violent video games (Game Law) to minors unconstitutionally restricted free speech, and ultimately found

134. *Strandlof*, 746 F. Supp. 2d at 1191.
135. 131 S. Ct. 2729 (2011).
136. 130 S. Ct. 1577.
137. 130 S. Ct. 876.
138. *See e.g. Brown*, 131 S. Ct. at 2741 (noting that "[e]ven where the protection of children is the object, the constitutional limits on governmental action apply").
139. The Court reminded readers that it recently dealt with another controversial First Amendment case involving the United States military—*Snyder v. Phelps*—in which the funeral of a fallen serviceman was protested. 132 S. Ct. at 2542 (citing 131 S. Ct. 1207 (2011)).

that it did.[140] The Court began by underscoring the rule that restrictions on free speech are presumptively invalid.[141] Unless a restriction on free speech falls into one of the narrowly defined categories previously acknowledged by First Amendment jurisprudence, that restriction will likely not pass constitutional muster.[142] Moreover, the Court stressed that a legislature cannot add another exception to free speech protection simply because it finds that particular speech "too harmful to be tolerated."[143]

Having set this background, the Court began by rebuffing the argument that the Game Law fit into the obscenity exception.[144] The Court pointed out that one similarity between the Game Law and obscenity statutes—a saving clause drawn from obscenity jurisprudence—would not suffice to draw the statute under this First Amendment exception.[145] This point is instructive in the context of the SVA because, attempts to say that falsehoods are their own exception aside, the SVA had at best a weak resemblance to the narrowly defined categories not protected by the First Amendment, such as defamation and fraud.[146] This point is well made by multiple authorities, not least of which is the Ninth Circuit.[147]

While the SVA may have sought to prevent people from telling lies, it lacked the essential element of an individual victim with an identifiable harm that defamation or fraud requires (each, admittedly, having its own unique requirements).[148] Under the SVA, harm was merely presumed by the legislature and was specifically rejected by *Brown* when it stated,

---

140. *Brown*, 131 S. Ct. at 2742.

141. *Id.* at 2733.

142. "'[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* at 2733 (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)).

143. *Id.* at 2734.

144. *Id.*

145. *Id.*

146. *See id.* at 2733 (discussing the limited exceptions to First Amendment protection).

147. *See Alvarez*, 617 F.3d at 1206–1215 (arguing that the SVA does not fit into any of the previously defined exceptions to First Amendment protection, including "defamation, fraud, and speech integral to criminal conduct").

148. *See e.g. id.* at 1207, 1211 (stating that "in a defamation case, a threshold question is whether the false speech at issue . . . is the proximate cause of an irreparable harm to another's reputation" and "[f]raud statutes must be precisely crafted to target only specific false statements that are likely to cause a bona fide harm").

> At the outset, [the State] acknowledges that it cannot show a direct causal link between violent video games and harm to minors. . . . [T]he State claims that it need not produce such proof because the legislature can make a predictive judgment that such a link exists. . . . [The State's] burden[, however,] is much higher, and because it bears the risk of uncertainty, . . . ambiguous proof will not suffice.[149]

This type of impermissible, predictive judgment is the same proof of harm that the legislature used in the SVA's congressional record.[150] There are statements made of presumed harm, but there is no clear proof.[151] Additionally, it defies common sense to assume the false and petty claims of military fakers could possibly take away from the valor symbolized in real military awards.[152]

After addressing the failure of the Game Law to fall into a traditionally exempt category of speech, the Court made the general point that offensiveness and the sensitivities of the majority do not carry the day in assessing the constitutionality of content-based speech restrictions—the law does.[153] To illustrate this point, the Court listed a series of problems that speech restrictions cannot solve, although they are issues worthy of a proactive solution.[154] The problems included "the problem of encouraging anti-Semitism, the problem of spreading a political philosophy hostile to the Constitution, or the problem of encouraging disrespect for the Nation's flag."[155] This last example is probably the most relevant to an evaluation of the SVA.

If the First Amendment allows people to defile the American flag by burning[156] or other more creative means of disrespect, then surely it compels the citizenry to tolerate unfortunate, harmless lies about the receipt of various military honors and medals. Although military honors and medals embody an essen-

149. *Brown*, 131 S. Ct. at 2738–2739.

150. *See* Pub. L. No. 109-437 § 2 (stating that individuals' lies have damaged the meaning of military honors and medals but failing to cite to concrete evidence).

151. *Id.*

152. *See Strandlof*, 746 F. Supp. 2d at 1191–1192 (stating that "disingenuousness is insufficient to undermine the stalwart and unswerving dignity and honor of our true military heroes, and of the military awards that recognize their sacrifices").

153. *Brown*, 131 S. Ct. at 2739 n. 8.

154. *Id.*

155. *Id.* (citations omitted).

156. *See e.g. Johnson*, 491 U.S. at 2548 (holding that the burning of the American flag is expressive conduct protected by the First Amendment).

tial, valuable aspect of the American spirit, the American flag is the one chosen symbol of the entire Nation and all that it encompasses. No subsidiary symbol to the American flag merits a different standard that threatens the very liberties ensured by the Constitution.

Finally, the Court discussed the important role that nongovernmental action plays in addressing worthy causes, such as the protection of children (or the honor of military medals and ribbons), where restrictions on free speech are not a constitutionally viable solution.[157] It is also important to remember that nongovernmental solutions will likely play an important role in addressing problems previously falling under the purview of the recently overturned portions of the SVA.

2. United States v. Stevens

In *Stevens*, the Court struck down a federal statute criminalizing depictions of animal cruelty (Depiction Statute) because the statute was overbroad and threatened to criminalize depictions of a substantial number of legal activities, such as hunting.[158] As in *Brown*, *Citizens United*, and *Alvarez*, the interest of the legislature was commendable,[159] but the chosen means of protecting that interest dangerously infringed upon the First Amendment. Here the federal government sought to prevent "'knowing[ ] . . . depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain.'"[160] The Court found that even an exceptions clause excluding "'any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value'" was not enough to pre-

157. *Brown*, 131 S. Ct. at 2740–2741.

158. *Stevens*, 130 S. Ct. at 1592.

159. In this case, the Depiction Statute was primarily enacted in response to "crush videos." *Id.* at 1583. Crush videos "often depict women slowly crushing animals to death 'with their bare feet or while wearing high heeled shoes,' sometimes while 'talking to the animals in a kind of dominatrix patter' over '[t]he cries and squeals of the animals, obviously in great pain.'" *Id.* at 1583 (quoting H.R. Rep No. 106–397, p. 2 (1999)). Although this is clearly a disturbing scenario, what would be more unacceptable is the dangerous chilling of free speech that would occur if an overly broad, poorly written statute were allowed to stand.

160. *Id.* at 1582 n. 1 (quoting 18 U.S.C. § 48(a) (2006)).

vent the statute from being overly broad.[161] The SVA did not contain an exceptions provision.[162]

The Court began its analysis of the Depiction Statute by entertaining the government's argument that the behavior covered by the Depiction Statute is a categorical exception to First Amendment protection.[163] This is a tactic implemented by the government in so many cases[164] that the overall consequence would be First Amendment protection being the exception, not the rule, were it not for the careful watch of the judiciary. The Court reiterated the limited number of categorical exceptions to First Amendment protection (obscenity, defamation, fraud, incitement, and speech integral to criminal conduct).[165] It also reinforced the notion that categorical exceptions are the exception, not the rule.[166] Even more disturbing to the Court was the government's rationale for creating a new categorical exception to First Amendment protection: the implementation of "a simple balancing test."[167] Evidently, the government took the Court's earlier description of the categorical exceptions to First Amendment protection—speech "'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality'"—as a

161. *Id.* at 1582–1583 (quoting 18 U.S.C. § 48(b)). The SVA did not include any exceptions clause and did not have a requirement that the behaviors it prohibited be done "knowingly" or with any other mental requirement. The plain language of the SVA included political and artistic speech about the receipt of military honors and medals, as long as that speech includes a false representation. The SVA was written as a strict liability statute.

162. *See generally* 18 U.S.C. § 704(b)–(d) (containing no exceptions provision).

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

164. *See e.g. Brown*, 131 S. Ct. at 2732–2734 (containing government claims that a special category of speech should be created for content directed at children); *Stevens*, 131 S. Ct. at 1584–1585 (exploring the government's claims that a special categorical exclusion from First Amendment protection should be created for depictions of animal cruelty); *Alvarez*, 617 F.3d at 1203 (analyzing the government's claims that a categorical exclusion from First Amendment protection should be created for false statements of fact without a specific victim or a specific, identifiable harm). These cases are just the tip of the iceberg, and they represent a dangerous, frequently implemented tactic used by the government. As the Court has said, "Our decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 130 S. Ct. at 1586.

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

166. *Id.*

167. *Id.* at 1585.

formula for creating new exceptions.[168] That is simply not the case.[169] As the Court makes clear,

> such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his [or her] speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor.[170]

Chief Justice Roberts made a point to stress that the First Amendment "reflects a judgment by the American people" that the benefits of free speech outweigh the sometimes painful cost, and this is not a determination that can simply be ignored.[171] This same point is applicable to an analysis of the government's position in *Alvarez*, where the government argued that falsehoods are a categorical exception to the First Amendment.[172] This position, based upon a misapplied quote from *Gertz* (and other opinions discussing the regulation of falsehoods in distinguishable contexts) may be a convenient argument, but it certainly does not articulate solid policy or an accurate application of previous precedent. Like in *Stevens*, where the government misused a descriptive quote from a previous Supreme Court opinion to argue for a categorical exception to First Amendment protection, the government in *Alvarez* misused dicta[173] to suggest that false statements are categorically not protected by the First Amendment.[174] This position is dangerous and misguided. As another court has acknowledged, "The Supreme Court does not ordinarily decide important questions of law by cursory dicta."[175]

---

168. *Id.* (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992)).

169. *Id.* at 1585–1586

170. *Id.* at 1586.

171. *Id.* at 1585.

172. 132 S. Ct. at 2545. "The primary argument advanced by the government . . . is that the speech targeted by the Act—demonstrably false statements about having received military honors—fits within those 'well-defined' and 'narrowly limited' classes of speech that are historically unprotected by the First Amendment." *Alvarez*, 617 F.3d at 1202.

173. *Gertz*, 418 U.S. at 340. "[T]here 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.* (citing *N.Y. Times Co.*, 376 U.S. at 270) (internal quotation marks omitted).

174. *Alvarez*, 132 S. Ct. at 2544–2545.

175. *In re Safety Harbor Resort & Spa*, 456 B.R. 703, 718 (Bankr. M.D. Fla. 2011).

Having dealt with the government's categorical exception argument, the Court went on to consider the merits of a facial challenge to the Depiction Statute.[176] The Court found the Depiction Statute facially unconstitutional because of its overly broad sweep into areas where prohibition was not permissible.[177] In coming to this conclusion, the Court first interpreted the statute, stating that "'it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.'"[178] The Court read the language of the statute, giving the words chosen their ordinary meaning.[179] Using this ordinary meaning, the Court found that the Depiction Statute would invoke a large web of federal and state laws—calling into question livestock statutes, laws protecting endangered species, "and hunting and fishing rules."[180] Additionally, the statute's plain language makes "no distinction based on the reason the intentional killing of an animal is made illegal."[181] This plain-language interpretation is telling when it is used to construe the plain meaning of the SVA.

A plain-language reading of the SVA reveals that any false representation "verbally or in writing [regarding the receipt of] any decoration or medal authorized by Congress for the Armed Forces of the United States" would result in a fine, imprisonment, or both.[182] What is clearly absent is any mental requirement or exceptions clause.[183] Notably, the Supreme Court seemed content in *Alvarez* to conclude that the SVA would not apply to speech in a theatrical performance.[184] It did so, however, rather dismissively—especially considering the plain language of the SVA, precedent like *Stevens*, and the importance of the issue.[185] Additionally, the concurrence implied a mental requirement into the

176. *Stevens*, 130 S. Ct. at 1586–1587.

177. *Id.* at 1592. "We read [Section] 48 to create a criminal prohibition of alarming breadth." *Id.* at 1588.

178. *Id.* at 1587 (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)).

179. *Id.* at 1588 (interpreting the statutory language, including words such as "wounded" and "killed"). *Id.* at 1588–1590.

180. *Id.* at 1588.

181. *Id.*

182. 18 U.S.C. § 704(b).

183. As previously mentioned, there is also no harm requirement. 18 U.S.C. § 704(b)–(d).

184. 132 S. Ct. at 2547.

185. The plurality simply states, "It can be assumed that [the SVA] would not apply to, say, a theatrical performance." *Id.* In support, the Court only parenthetically cites to one case, *Milkovish v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990), and then moves on from the issue. *Id.*

SVA by citing to background common law principles.[186] These two areas are examples of where various factions of the Supreme Court could have improved their analysis of the SVA.

In *United States v. Chappell*,[187] Judge James A. Wynn, Jr. of the Fourth Circuit helpfully explained the danger of removing the burden of careful drafting, as represented by the two aforementioned assumptions present in *Alvarez*.[188] In *Chappell*, the Court upheld a Virginia impersonation statute that failed to include a mental requirement.[189] The majority cited to *Alvarez* and stated that background common law principles implied a *mens rea* requirement that modified the plain language of the statute and saved it from an overbreadth challenge.[190] In response, Judge Wynn insightfully noted several things. First, he noted that the Virginia legislature had clearly demonstrated its ability to write statutes with explicit mental requirements through its intentional drafting of other statutes—requirements clearly absent from the statute at issue.[191] He concluded that

> when the Virginia legislature enacted these statutes, it clearly knew how to write such elements into statutes. But in the statute at issue here, . . . it chose not to do so. This Court is not at liberty to override that decision but rather must respect the choice of the state legislature that drafted the statute.[192]

Second, Judge Wynn pointed out a flaw in the majority's reasoning, stating,

> "We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." The majority opinion seems to suggest that prosecutors will interpret the statute much more restrictively than its face suggests, presumably thereby sparing the statute from constitutional problems. . . . But as the Supreme Court noted in *Stevens*, the need to point out that the challenged statute would be applied

186. *Alvarez*, 132 S. Ct. at 2552–2553 (Breyer & Kagan, JJ., concurring) (citing *Staples v. United States*, 511 U.S. 600, 605 (1994)). The concurrence did not provide much analysis to support this conclusion that the SVA did not apply to theatrical performances.

187. *United States v. Chappell*, 691 F.3d 388 (4th Cir. 2012).

188. *Id.* at 400–401 (Wynn, J., dissenting).

189. *Id.* at 391, 398–399 (majority).

190. *Id.* at 394.

191. *Id.* at 407 (Wynn, J., dissenting).

192. *Id.* at 407–408. Judge Wynn made other salient points, not discussed here. *Id.*

> more restrictively than its language permits simply underscores the statute's overbreadth.[193]

The same issue in the majority's reasoning in *Chappell* that Judge Wynn addressed is present in the flawed reasoning of the Court in *Alvarez* on this point.[194]

The absence of a mental requirement or other limiting language in the plain language of the SVA means that making false claims about the receipt of military honors or medals for artistic depictions[195] or political protests could have resulted in a fine, imprisonment, or both.[196] The SVA may also have applied to statements by the insane or the delusional.[197] It also could have applied to statements by children who are subject to innocent but false statements of grandeur or claims that are made solely in imitation of those they respect.[198] Additionally, if a war protester falsely claimed to be a recipient of various military honors or medals so that he or she might satirically depict America's involvement in an unpopular foreign war, that individual may

193. *Id.* at 409 (citations omitted) (citing *Stevens*, 130 S. Ct. at 1591). Judge Wynn stated that the plain language of the impersonation statute at issue covered "children playing cops and robbers on the front lawn; trainees at a police academy role-playing; and actors in plays in which peace officers are characters." *Id.* at 408.

194. *Compare Chappell*, 691 F.3d at 408 (analyzing the overbreadth of a statute by considering its numerous impermissible applications) *with Alvarez*, 132 S. Ct. at 2552 (claiming the SVA's suppression of certain statements does not necessitate a strict scrutiny analysis).

195. *Alvarez*, 617 F.3d at 1214. "Further, . . . method actors getting into character, . . . poets using hyperbole, or authors crafting a story, . . . often make factual statements or assertions which, as they are fully aware, are entirely untrue." *Id.*

196. *See* 18 U.S.C. § 704(b)–(d) (setting penalties against misrepresentations of medal recipients).

> Satirical . . . media outlets play a significant role in inviting citizens alienated by mainstream news media into meaningful public debate over economic, military, political and social issues. . . . [W]ould anyone with even a rudimentary knowledge of First Amendment law seriously argue that the satirical, false statements frequently contained in such writing and programming are . . . outside First Amendment protection?

Alvarez, 617 F.3d at 1213–1214.

197. *See* 18 U.S.C. § 704(b)–(d) (providing no exception for people with mental impairments).

198. Justice Samuel A. Alito, Jr. worried about a modified version of this concern regarding children. *See* Transcr., *United States v. Alvarez*, http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-210.pdf at **14–15 (Feb. 22, 2012) (No. 11-210, 132 S. Ct. at 2537) (asking if it would also be permissible to criminalize false statements about a parent being a military medal recipient).

have been subject to a fine, imprisonment, or both.[199] While the Supreme Court may be content to conclude that prosecutors and lower courts would not have construed the SVA to apply to theatrical performances or persons without a culpable mind, the Ninth Circuit's opinion[200] and precedent from the Fourth Circuit[201] suggest that great minds may disagree.

These are simply a few of the potential consequences of the plain language chosen by the legislature for the SVA. Notably, an overbreadth challenge will succeed where "'a substantial number of [a statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'"[202] These few examples, likely to easily outnumber constitutionally permissible applications of the SVA, demonstrate that an overbreadth challenge to the SVA certainly had merit.[203] This is just one of the several reasons why the SVA is unconstitutional.

Finally, in *Stevens*, the Court declined to "'rewrite [the] law to conform it to constitutional requirements,' . . . for doing so would constitute a 'serious invasion of the legislative domain,' . . . and sharply diminish Congress'[ ] 'incentive to draft a narrowly tailored law in the first place.'"[204] Similarly, the SVA should not have been rewritten by the Supreme Court, as it was by the court in *Strandlof*.[205] The Supreme Court was, however, correct to cast out the SVA because of the dangerous way that the SVA

199. Satirical statements about receiving medals could be subject to fines and imprisonment. *See supra* n. 196 and accompanying text (stating fines and other consequences in cases of misrepresentation).

200. *See Alvarez*, 617 F.3d at 1213–1214 (discussing various forms of art and satire). Although the Ninth Circuit did not directly say that the SVA covered theatrical performance and other similar speech, the court did feel the need to discuss and defend them in its discussion of the government's categorical exception argument. *Id.* With strict liability in the mix of the various levels of mental culpability required, the burden should be on legislatures to appropriately and explicitly limit the scope of their laws.

201. *See Chappell*, 691 F.3d at 400 (Wynn, J., dissenting) (noting that the statute on impersonation is constitutionally overbroad).

202. *Stevens*, 130 S. Ct. at 1587 (quoting *Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 449 (2008)) (internal quotation marks omitted).

203. *See* Davidson, *supra* n. 24, at 20 (discussing an estimate of the number of SVA cases in 2009).

204. 130 S. Ct. at 1592 (citations omitted). The Court also stated that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Id.* at 1591.

205. 667 F.3d 1146. At least two courts erroneously read constitutional requirements into the SVA that saved the statute from invalidation. *E.g. id.*; *Robbins*, 759 F. Supp. 2d at 822.

infringed on the breathing space required by the First Amendment.

3. Citizens United v. Federal Election Commission

Citizens United is the last case included to illustrate the general point that even legislation with the best intentions must be struck if it has dangerous, unconstitutional, speech-restricting consequences.[206] The Supreme Court struck down a federal statute that prevented corporations from making certain direct political expenditures.[207] In doing so, the Court emphasized that some provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) intolerably chilled free speech.[208] The Court noted that precedent does not support distinguishing between the speaking rights of media corporations and nonmedia corporations.[209] Additionally, the Court found that corporations and other nonperson entities play an important role in informing citizens so they can fully participate in the political process.[210] Although this ruling is highly controversial, it illustrates the point that the best of intentions—including preventing actual or apparent corruption in the political process due to unmitigated political contributions—should not cloud the issues and stop an unconstitutional statute from being struck down.[211] Further, it illustrates that the Supreme Court has issued a series of recent decisions that reinforce the importance of carefully guarding the First Amendment, even in the face of highly offensive speech.[212]

206. *Citizens United* is only briefly discussed here, but this brief discussion is not intended to dismiss the great controversy currently surrounding the case.

207. *Citizens United*, 130 S. Ct. at 917.

208. *Id.*

209. *Id.* at 905.

210. *Id.* at 907.

211. *See id.* at 908 (stating that criminal law cannot be used to silence distrusted speakers).

212. *See Snyder*, 131 S. Ct. at 1213 (discussing the need to tolerate highly offensive speech by a fringe religious group, although the speech is often targeted at military funerals).

B. Fidelity to the Fundamental Values of the First Amendment Required a Finding That the SVA Was Unconstitutional because the SVA Placed Symbols before Liberty

Putting current Supreme Court trends aside, the SVA was not unique in purpose. The federal government has attempted to create a number of sacred symbols, but thankfully many of its efforts have failed.[213] The SVA is unconstitutional because it was the government's latest attempt to create a monopoly on the proper use of government symbols—various military honors and medals. At least two cases demonstrate that any government attempt to create a symbol beyond the reproach or "misuse" of the people should be met with vigorous resistance.[214] As the Court stated in *Texas v. Johnson*,

> [t]o conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.[215]

Keeping in mind this outright rejection of the concept that symbols are more sacred than free speech, this Part discusses the applicability of *Texas v. Johnson*[216] and *Schacht v. United States*[217] to an analysis of how the SVA assaulted fundamental First Amendment principles. Again, symbols are not more sacred than free speech—free speech is the ultimate cornerstone of American liberty.

---

213. *See infra* pt. III(B)(1)–(2) (discussing at least two government attempts to sanctify symbols).

214. *E.g. Schacht v. United States*, 398 U.S. 58 (1970); *Johnson*, 491 U.S. 397 (providing examples of cases where the Supreme Court found such speech restrictions to be unconstitutional).

215. *Johnson*, 491 U.S. at 417.

216. 491 U.S. 397 (holding that the burning of the American flag is expressive conduct protected by the First Amendment).

217. 398 U.S. at 60 (invalidating a federal statute permitting an actor to wear a uniform of the armed forces only if that actor's portrayal is positive).

1. "Misuse" of the Flag: An Examination of Texas v. Johnson

During a political protest, Gregory Lee Johnson "unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted: 'America, the red, white, and blue, we spit on you.'"[218] Johnson was subsequently charged under Texas law with "the desecration of a venerated object."[219] After being sentenced to one year in prison and a $2,000 fine, Johnson appealed his conviction and argued that the Texas desecration statute (Desecration Statute) was facially unconstitutional.[220] The Supreme Court found the Desecration Statute unconstitutional.[221]

Johnson is an informative case because it draws a distinct line in the sand: national liberty first, national symbols second.[222] In *Johnson*, the state government was concerned that desecration of the American flag would lead to an erosion of American unity.[223] The Court dismissed this as an inadequate justification for restricting Free Speech.[224]

The government's self-professed justification for enacting the SVA relied on the same flawed reasoning (and misplaced good intentions) presented by the government in *Johnson*.[225] The SVA's legislative record expresses a concern that

> [f]raudulent claims surrounding the receipt of the Medal of Honor, the distinguished-service cross, the Navy cross, the Air Force cross, the Purple Heart, and other decorations and medals awarded by the President or the Armed Forces of the

218. *Johnson*, 491 U.S. at 399.
219. *Id.* at 400.
220. *Id.*
221. *Id.* at 399.
222. *Id.* at 415.
223. *Id.* at 413.

> [T]he State's claim is that it has an interest in preserving the flag as a symbol of *nationhood* and *national unity*, a symbol with a determinate range of meanings . . . . According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.

Id. (emphasis in original) (internal citation omitted).
224. *Id.* at 418–419.
225. Pub. L. No. 109–437, § 2, 120 Stat. 3266 (2006).

> United States damage the reputation and meaning of such decorations and medals.[226]

There is no direct evidence to support the notion that military honors and medals are actually degraded by the speech of a small group of liars.[227] Even if this had been proven,[228] however, the legislature drafted the SVA based on reasoning previously rejected in *Johnson*.[229]

In fact, the SVA flew directly in the face of the Court's recommended course of action for combating the offensive use of national symbols and other undesirable messages. Speech restrictions are not the right course of action. More speech is the right course of action. Not only does more speech effectively combat false notions in the marketplace of ideas,[230] it also is the best way to honor the lofty values embodied by important national symbols such as military honors or medals. After all, "[w]e do not consecrate [an important national symbol] by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents."[231] This lofty, inspiring, and enlightened perspective should not be abandoned now.[232]

---

226. *Id.* at 3266.

227. *Alvarez*, 132 S. Ct. at 2549 (plurality); *Alvarez*, 617 F.3d 1198, 1209–1210.

228. There was no direct, concrete, objective evidence of this found in any of the materials located while researching this Article. In *Johnson*, the Court was also not able to find evidence that flag desecration led to such damage, and the Court paraphrased Justice Holmes, stating that "we submit that nobody can suppose that this one gesture of an unknown man will change our Nation's attitude towards its flag." *Johnson*, 491 U.S. at 418–419.

229. *Id.* at 413, 418–419.

230. *See* Wood, *supra* n. 17, at 474–479 (introducing four schools of thought on the protection of free speech).

231. *Johnson*, 491 U.S. at 420. This position is by no means meant to trivialize the feelings of anger, sadness, and frustration that many feel when they see an important national symbol misused. In the words of Justice Kennedy,

> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution . . . compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision.

Id. at 420–421 (Kennedy, J., concurring). Not everyone agrees with this position, and there is understandable passion expressed by those who do not share the view of the *Johnson* majority. *See id.* at 421–439 (Rehnquist, White & O'Connor, JJ., dissenting) (recounting the history behind the flag and citing to angry letters from troops as support for the minority's position).

232. *See also Smith v. Goguen*, 415 U.S. 566, 567–568 (1974) (finding a Massachusetts statute criminalizing misuse of a flag constitutionally vague). The *Smith* case considered a

2. "Misuse" of a Military Uniform: An Examination of Schacht v. United States

Schacht is an interesting case because it underscores the idea that government cannot control speech about itself and its symbols by allowing a positive message and criminalizing a negative message about the same symbol.[233] In essence, the government should not be picking winners in the marketplace of ideas, including ideas about the government. The Court clarified that "previous cases would seem to make it clear that . . . making it an offense to wear our military uniforms without authority is, standing alone, a valid statute on its face."[234] This qualification only emphasizes the importance of acknowledging the constitutional distinction between Section 704(a)[235] of the SVA and Section 704(b)[236] of the SVA. This Article is not criticizing the former section of the SVA.

In *Schacht*, Daniel Jay Schacht was convicted of violating a federal statute that contained a provision that only permitted people engaged in a theatrical production to "'wear the uniform of [a member of the armed forces] *if the portrayal does not tend to discredit that armed force*.'"[237] Schacht challenged the constitutionality of this particular provision of the statute, and the Court agreed with Schacht.[238] The Court stated,

> An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance. The last clause of [the statute] denies this constitutional right to an actor who is wearing a military uniform by making it a crime for him [or her] to say things that tend to bring the military into discredit and disrepute. . . . Clearly punishment for this reason would be an unconstitutional abridgment of free-

strange set of facts involving a man who had sewn a United States flag onto the seat of his pants. *Id.* at 568.

233. *See generally Schacht*, 398 U.S. at 63 (holding that restricting what an actor may say when dressed in the uniform of one of the branches of the Armed Forces was a violation of the First Amendment).

234. *Id.* at 61.

235. 18 U.S.C. § 704(a) (criminalizing certain conduct involving military decorations, medals, badges, ribbons, buttons, rosettes, and their "colorable" imitations).

236. *Id.* at § 704(b)(criminalizing bare false statements of fact).

237. *Schacht*, 398 U.S. at 60 (emphasis in original) (quoting 10 U.S.C. § 772(f) (2006)).

238. *Id.* at 63.

> dom of speech. The final clause of [the concerned statutory provision], which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment.[239]

The Court made it clear that the government cannot restrict free speech for the sake of preventing people from criticizing the federal government, including the armed forces.[240] The Court also stressed that upholding the statute in *Schacht* would endanger the ability of free citizens to protest the government.[241] The SVA and its great breadth similarly—but more so than the statute in *Schacht*—threatened the ability of people in the United States to criticize the government or to employ creative tactics to highlight the truth. As previously noted, the SVA could have criminalized satirists, artists, the insane, the immature, the young, and the everyday person by authorizing the federal government to jail people for making false claims[242]—claims that have no specific victim and no specific harm. These claims are merely offensive. It was too dangerous to allow the SVA to stand, and *Schacht* helps readers deconstruct the notion that the military and its symbols live in a sphere devoid of basic First Amendment rights.

Taken together, *Johnson* and *Schacht* stand for the proposition that symbols must take a backseat to liberty, even where those symbols have been sanctified by sacrifice. The day that symbols become more important than fundamental American liberties is the day those symbols lose their sacred meaning altogether.[243] The SVA was unconstitutional because it embodied a policy of symbolism over liberty.[244]

---

239. *Id.*
240. *Id.* at 62–63.
241. *Id.*
242. *Supra* pt. III(A)(2) (discussing how the SVA could have criminalized false claims).
243. For a brief introduction to a society where there are plenty of symbols but there is a distinct shortage of liberty, see Library of Congress F. Research Div., *Country Profile: North Korea* 4–5 (July 2007) (available at http://lcweb2.loc.gov/frd/cs/profiles/North_Korea.pdf).
244. *Alvarez*, 132 S. Ct. at 2543.

IV. PUBLIC AND PRIVATE ALTERNATIVES TO THE SVA (MORE SPEECH, NOT LESS SPEECH): A BETTER, CONSTITUTIONAL SOLUTION

The SVA was a constitutionally flawed piece of legislation that dangerously chilled free speech. Fortunately, the SVA is not the only solution available to those who are concerned with preserving the integrity[245] of military honors and medals. In fact, there are government and nongovernment solutions to exposing those who lie about military valor. Combining these solutions will help to address the concerns of SVA proponents while also ensuring that a strong policy of more speech, not less speech, be used in all but the direst circumstances where there is an immediate threat of an irreparable harm.[246] It is realistic to acknowledge that there is no perfect solution to problems the SVA sought to address. Where creative solutions fail, it is important to keep in mind that sometimes the First Amendment requires the American people to suffer through speech they find offensive.

A. Public Solutions to the Problem the SVA Sought to Address

Government solutions to the problem of "stolen valor" enable the public to play their part in preventing individual liars from getting away with false claims. Realistically, private action is less feasible without government solutions. The key to effective and constitutional government involvement is limited government involvement.[247] This Part addresses the possibility of a narrowly

245. The word "integrity," as used here, is a label meant to acknowledge the fear of those who worry that military honors and medals will be damaged by those who make false claims about receiving them. This term should not be construed to mean that the Author of this Article believes that a small number of false claims could actually undermine the legitimate valor of so many brave members of the armed forces. That seems an unlikely threat that underestimates the power of real valor and overestimates the power of plain lies.

246. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Johnson*, 491 U.S. at 419 (quoting *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring)) (internal quotation marks omitted).

247. The United States has grown far too comfortable with putting people in prison, and this is too great a country not to find more creative approaches to furthering important policy. *See* N.C. Aizenman, *New High in U.S. Prison Numbers: Growth Attributed to More Stringent Sentencing Laws*, Wash. Post A1 (Feb. 28, 2008) (available at http://www.washingtonpost.com/wp-dyn/content/story/2008/02/28/ST2008022803016.html).

tailored, carefully written SVA that might pass constitutional muster. It will also address the role government can play in empowering the public to get involved in preserving the valor of veterans.

1. A More Narrowly Tailored, Carefully Written SVA Might Meet Constitutional Muster

Passing a new SVA that meets constitutional standards is one possible solution to the problem of lies about military valor. One piece of alternative legislation that recently passed in the House of Representatives is H.R. 1775.[248] As previously mentioned, this bill would add an intent requirement to the falsity provision of the SVA and require that false statements be made to gain something of value.[249] Both of these changes, present in The Stolen Valor Act of 2012, represent legislative movement in the right direction, but the "tangible benefit" language used in the updated act is still potentially vague.[250] Therefore, The Stolen Valor Act of 2012 is not an ideal solution to the problem of "stolen valor."

2. More Public Disclosure Is a Stronger Solution to Problems the SVA Sought to Address

Ideally, any future SVA legislation will avoid attempts to criminalize pure lies and limit criminal prosecution to cases that involve actual fraud or other constitutionally unprotected speech. Looking beyond criminal provisions, a publication requirement that obligates the United States government to clearly post the full legal names of every individual who has received a military

---

> More than one in [one hundred] adults in the United States is in jail or prison, an all-time high that is costing state governments nearly $50 billion a year and the federal government $5 billion more . . . . With more than 2.3 million people behind bars, the United States leads the world in both the number and percentage of residents it incarcerates, leaving far-more-populous China a distant second, according to a study by the nonpartisan Pew Center on the States.

Id.

248. H.R. 1775, 112th Cong. There is also a Senate version of this bill. Sen. 1728, 112th Cong. (Oct. 18, 2011) (available at http://www.gpo.gov/fdsys/pkg/BILLS-112s1728is/pdf/BILLS-112s1728is.pdf).

249. H.R. 1775, 112th Cong. at § 2.

250. *Id.*

medal or ribbon should exist.[251] The plurality in *Alvarez* already endorsed this solution, and—despite the dissent's protests[252]—this is one solution that appears feasible, as evidenced by recent efforts by the United States Department of Defense.[253] The Department of Defense's current efforts fall short of the comprehensive list that would be required to enable the public to identify military valor fakers. The Department of Defense specifically states that "the information made available on [its] website should not be used to confirm whether or not an individual was awarded the subject awards for any purpose."[254] To be effective, a more comprehensive list must be made publicly available. Publishing this information will allow private groups to track, monitor, and expose individuals who falsify their military valor. Some information on military award recipients is already publicly available,[255] but more information is needed.

Notably, a bill requiring that comprehensive information about genuine military honor and medal recipients be publicly available was referred to the House Committee on Armed Services on January 23, 2009—this bill is referred to as the "Military Valor Roll of Honor Act."[256] It appears that no significant action

251. *See* Jared Paul Haller, United States v. Alvarez*: What Restrictions Does the First Amendment Impose on Lawmakers Who Wish to Regulate Factual Speech?* 45 Ind. L. Rev. 191, 211–212 (2011) (citing Julie Hilden, *Litigating the Stolen Valor Act: Do False Claims of Heroism in Battle Harm Genuine Heroes?* http://writ.news.findlaw.com/hilden/20101122.html (Nov. 22, 2010)) (discussing Julie Hilden and her proposal that the government create an online, searchable database of military medal recipients).

252. *Alvarez*, 132 S. Ct. at 2551, 2559–2560 (Alito, Scalia & Thomas, JJ., dissenting).

253. Jim Garamone, U.S. Dep't of Def., *New Website Honors Service Members' Valor*, http://www.defense.gov/news/newsarticle.aspx?id=117256 (Nov. 14, 2012).

254. U.S. Dept. of Def., *U.S. Air Force Air Cross Recipients*, http://valor.defense.gov/Recipients/AirForceAirForceCrossRecipients.aspx (last updated July 31, 2012).

255. *See Alvarez*, 617 F.3d at 1210 n. 11 (mentioning the Congressional Medal of Honor Society and the Congressional Medal of Honor Foundation). The Congressional Medal of Honor Society has a "Recipients" section with a complete alphabetical listing of all recipients. Cong. Medal of Honor Soc'y, *Full Archive*, http://www.cmohs.org/recipient-archive.php (accessed Apr. 2, 2013) (providing individual listings with a photograph, general biographical information, and the story behind why the citation was awarded). Readers can look under "Meyer, Dakota" for more information about a recent recipient. *Id.* These recipients are truly inspiring individuals, and it is no wonder that people are concerned with their legacy. *See* U.S. Dep't of Def., *Military Awards for Valor—Top 3*, http://valor.defense.gov/Home.aspx (accessed Apr. 2, 2013) (displaying a growing list of military award recipients in the U.S. Army, Navy, Marine Corps, and Air Force).

256. H.R. 666, 111th Cong. §§ 1–2 (PDF available at http://www.gpo.gov/fdsys/pkg/BILLS-111hr666ih/pdf/BILLS-111hr666ih.pdf).

has been taken on this bill since that time.[257] Specifically, the bill provides, in part:

> The Secretary of Defense shall establish and maintain a database, to be known as the "Military Valor Roll of Honor," which shall contain the names and citations of all members of the Armed Forces, members of the United States merchant marine (including the Army Transport Service and the Naval Transport Service), and civilians affiliated with the Armed Forces who have been awarded the medal of honor or any other medal authorized by Congress for the Armed Forces, the United States merchant marine, or affiliated civilians. The Military Valor Roll of Honor shall include the names of those members recorded on the "Army, Navy, Air Force, and Coast Guard Medal of Honor Roll" maintained pursuant to section 1560 of title 38. . . . The Military Valor Roll of Honor shall be a searchable database and available for public inspection.[258]

The government could enact legislation similar to The Military Valor Roll of Honor to further ensure that the government remains committed to a policy of disclosure, over a policy of punishment, when it comes to protecting veterans. Admittedly, there are legitimate national security concerns that may arise from the publication of the names of American war heroes, and those concerns do merit further attention and investigation. In the face of the struggle to find an ideal solution to the problem of SVA, it is only honest to admit that there may not be one. In any case, it is always best for the American people to err on the side of protecting bedrock principles like the First Amendment.

---

257. *Id.*

258. *Id.* at § 2.

> There shall be . . . a roll designated as the "Army, Navy, Air Force, and Coast Guard Medal of Honor Roll." . . . [O]n such roll [shall be] the name of each surviving person who has served on active duty in the armed forces of the United States and who has been awarded a medal of honor for distinguishing such person conspicuously by gallantry and intrepidity . . . above and beyond the call of duty while so serving.

38 U.S.C. § 1560 (2006).

B. Private Action Is a Strong Solution to Problems the SVA Sought to Address

Private organizations dedicated to finding and outing people who lie about receiving military honors and medals have the unique ability to monitor truth and falsehood without requiring the government to pass legislation that puts people in criminal and civil fear of exercising their First Amendment rights.[259] Private organizations may be the real solution to the "stolen valor" problem.[260] Fortunately, there are already some organizations in place that outline procedures for identifying, documenting, and outing people who lie about their military service record.[261] The problem is that many of these websites were created with the aim of building a successful case under the SVA.[262]

Ideally, websites that previously focused on the possibility of building a successful case under the SVA[263] will begin tailoring their information gathering toward private individuals by exposing fakes through humiliation, not prosecution. At least one website already contains a link to the type of public outing that private organizations can orchestrate when they identify someone lying about his or her military service record.[264] Even the Supreme Court noted that "the dynamics of free speech, of counterspeech, of refutation can overcome [lies about military valor]."[265] Therefore, public outings will likely play an important

259. *See e.g.* Stolen Valor, *supra* n. 21 (providing tips for how private citizens can collect evidence and help build a Stolen Valor case against suspected fraudsters). History has shown that private individuals are adept at identifying people who fake their military valor. *See* Christen Davenport, *Exposing Falsified Valor*, Wash. Post A1 (May 10, 2010) (available at http://www.washingtonpost.com/wp-dyn/content/article/2010/05/09/AR2010050903363.html) (discussing Doug Sterner and his ability to spot a fake based on the misuse of words like "takes pride" and a signature by the wrong Navy Secretary). It just takes a sharp eye and commitment to the cause.

260. *Supra* n. 259 and accompanying text.

261. *See e.g.* Stolen Valor, *supra* n. 21, at http://www.stolenvalor.com.

> It starts off simple enough. A casual mention of military service. And, oh by the way, a Purple Heart and a few other honors earned. . . . From there, . . . the fabrication is woven so tightly you begin to suspect . . . . How can one person achieve so much in such a short time? It's almost too good to be true.

Id.

262. *See e.g. id.* at http://www.stolenvalor.com/poser.cfm (stating that "[t]his is the core of any Stolen Valor prosecution").

263. *See e.g. id.* at http://www.stolenvalor.com (containing a "Stolen Valor update" on the homepage).

264. *Id.*

265. *Alvarez*, 132 S. Ct. at 2549 (plurality).

role in replacing prosecution under the former version of the SVA or following successful prosecutions under any future versions of the SVA.[266]

Thinking beyond this one example, people need to be creative when addressing the "stolen valor" problem. For example, another solution could be a website that mirrors the Congressional Medal of Honor Society—potentially a website that awards individuals a Medal of Infamy.[267] A public list of confirmed military valor fakers could be compiled and maintained by a committed group of private citizens that empowers people to verify extraordinary claims of military service for themselves.[268]

Also, in the age of mass communication, people committed to preserving the integrity of military medals and ribbons can make a point to include military valor fakers in their programming. For example, Stephen Colbert currently has a "Tip/Wag" segment that calls people out for their commendable and despicable behavior, alike.[269] Why not use this segment as an opportunity to expose the next Xavier Alvarez?[270]

The public has too many alternatives to the criminalization of mere falsehoods to justify any encroachment on the First Amendment.[271]

V. CONCLUSION

The SVA unconstitutionally restricted free speech, and the Supreme Court was right to overturn it. Liberty must always come before symbolism. Liberty is the ultimate American value,

266. To be clear, this still refers only to Section 704(b) of the SVA and its enhancement provisions.

267. Justice Antonin Scalia suggested a government version of this potentially private solution during oral argument. *See* Transcr., *United States v. Alvarez*, http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-210.pdf at *44 (No. 11-210, 132 S. Ct. 2537) (asking "[h]ow about giving a medal of shame to those who have falsely claimed to have earned the medal of valor?").

268. *See* Hilden, *supra* n. 20 (discussing the possibility of a "consolidated, searchable online government database of the names and ages of all true U.S. medal recipients").

269. Comedy Central, *Colbert Nation, Tip/Wag*, http://www.colbertnation.com/video/tags/Tip~Wag (accessed Apr. 2, 2013). "Stephen Colbert is the host, writer[,] and executive producer of the Emmy and Peabody Award-winning series 'The Colbert Report' on Comedy Central . . . ." *Id.* at http://www.colbertnation.com/about.

270. *See Alvarez*, 617 F.3d at 1200–1201 (discussing the factual background of this infamous SVA case).

271. *See* 18 U.S.C. § 704(b)–(d) (criminalizing mere false statements without any intent requirement or a specific, identifiable harm to a specific, identifiable victim).

and even in the face of a compelling cause—such as respect for the men and women of the United States armed forces—the American people cannot lose sight of that. Fortunately, the current trend in the Supreme Court is one that represents a careful guardianship of the First Amendment. Additionally, fundamental First Amendment values reinforce the conclusion that the SVA could not have been allowed to stand. In place of the SVA, an intelligent combination of government and nongovernment solutions working in cooperation should be implemented. These alternative solutions may allow the American people to have their cake and eat it too—robust, uninhibited free speech will continue to flourish, and respect for honest military valor will be encouraged. Regardless of the solutions implemented, it is important to remember that diluting the First Amendment to silence a small band of liars would be a sacrilege much greater than the lies themselves.

Stetson Law Review

would like to extend a special thanks to its sponsors:

BUSH | ROSS
ATTORNEYS AT LAW

Macfarlane Ferguson & McMullen, P.A.

STETSON'S ADR BOARD:
TRAINING THE WELL-ROUNDED LAWYER

OVERVIEW & ACCOMPLISHMENTS 2012–2013

OVERVIEW: Before setting foot in a courtroom, a well-trained lawyer must be prepared to meet and greet clients, arbitrate conflicts, negotiate with opposing counsel, and mediate disputes. Founded in the fall of 2001, Stetson's ADR Board (formerly the Client Skills Board) is an organization designed to prepare students to practice law by improving their interpersonal skills, professionalism, and strategic ability. The ADR Board consists of fifteen to twenty-five students who participate on one or more of the following teams: Arbitration, Client Counseling, Negotiation/Environmental Negotiation, Representation in Mediation, and the Student Tax Law Challenge.

ACCOMPLISHMENTS: From fall 2012 through spring 2013, the ADR Board participated in eight competitions, and these are the highlights:

ABA LAW STUDENT DIVISION REGIONAL NEGOTIATION COMPETITION
MIAMI, FLORIDA—NOVEMBER 2012
Rachael Bushey and Natasha Samria
Finalists / Third Place

ABA LAW STUDENT DIVISION NATIONAL NEGOTIATION COMPETITION
DALLAS, TEXAS—JANUARY 2013
Rachael Bushey and Natasha Samria
Semifinalists

LIBERTY UNIVERSITY SCHOOL OF LAW
ANNUAL NATIONAL NEGOTIATION COMPETITION
LYNCHBURG, VIRGINIA—JANUARY 2013
Rachel Ellis and Frank Leung
Finalists / Second Place

ABA LAW STUDENT DIVISION REGIONAL CLIENT COUNSELING COMPETITION
MACON, GEORGIA—FEBRUARY 2013
Lauren Orebaugh and Tyler Raiford
Finalists / Third Place

INTERNATIONAL CANADIAN MEDIATION ASSOCIATION COMPETITION
TORONTO, ONTARIO—MARCH 2013
Melissa Casanueva and Sarah Potter
Finalists / Second Place

ROBERT MERHIGE, JR. NATIONAL ENVIRONMENTAL NEGOTIATION COMPETITION
RICHMOND, VIRGINIA—MARCH 2013
Wesley Heim and Frank Leung
Semifinalists

The ADR Board tryouts are held every fall. Students chosen to join the ADR Board attend a weekly class to learn the skills and strategies for effective ADR practice and to prepare for competition. Professor Kelly Feeley is the Board's faculty advisor and coaches several of the teams, so please contact her with any questions at (727) 562-7394 or feeley@law.stetson.edu.

STETSON UNIVERSITY COLLEGE OF LAW'S MOOT COURT BOARD *ACCOMPLISHMENTS* 2012–2013

2012 Robert Orseck Memorial Moot Court Competition
Orlando, Florida
Caitlein Jammo, Erin Okuno, and Morgan Vasigh
Semifinalists
Best Brief Award

2012 E. Earle Zehmer Worker's Compensation Moot Court Competition
Orlando, Florida
Erik Johanson, Tyler Egbert, and Sharon Galantino
Semifinalists

24th Annual University of San Diego School of Law National Criminal Procedure Tournament
San Diego, California
Deidra Brown and Kayla Cash
Second Place, Petitioner's Brief

31st Annual John Marshall Law School International Moot Court Competition in Information Technology and Privacy Law
Chicago, Illinois
Chad Burgess, Caitlein Jammo, and Jonathan Hart
Octofinalists
Second Best Oralist (Chad)

National Veterans Law Moot Court Competition
Washington, D.C.
Amar Agha and Erik Johanson
Finalists
Best Petitioner's Brief

Michael Millett and Michelle Reilly
Best Respondent's Brief

New York City Bar's 63rd Annual National Moot Court Competition
Region V—Jacksonville, Florida
Champions

ACCOMPLISHMENTS
2012–2013
~continued~

NATIONALS
NEW YORK, NEW YORK
Julia McGrath, Andrew Harris, and Victoria San Pedro
John W. Davis Cup Award for Best Team
Runner-up Best Individual Speaker Award (Julia)

MERCER MOOT COURT COMPETITION ON LEGAL ETHICS AND PROFESSIONALISM
MACON, GEORGIA
Jamie Combee, Tyler Egbert, and Brian Howsare
Quarterfinalists

ANDREWS KURTH MOOT COURT NATIONAL CHAMPIONSHIP
HOUSTON, TEXAS
Chad Burgess, Erin Okuno, and Morgan Vasigh
Finalists
Best Brief Award

2013 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION
NEW ORLEANS, LOUISIANA
Sharon Galantino, Caitlein Jammo, Bradley Muhs, and Carly Ross
Second Place Overall
Second Place Memorial
(Advanced to the International Finals)

THE FLORIDA BAR INTERNATIONAL LAW SECTION WILLEM C. VIS PRE-MOOT
MIAMI, FLORIDA
Paul Crochet, Meagan Foley, Michael Rothfeldt, Lisa Tanaka, and Alexander Zesch
Champions
Best Oralist (Meagan)

ABA LAW STUDENT DIVISION NATIONAL APPELLATE ADVOCACY COMPETITION
BOSTON, MASSACHUSETTS
Amar Agha, Deidra Brown, and Jamie Combee
Semifinalists

21ST ANNUAL CHIEF JUDGE CONRAD B. DUBERSTEIN NATIONAL BANKRUPTCY MEMORIAL MOOT COURT COMPETITION
NEW YORK, NEW YORK
Brian Howsare, Erik Johanson, and Michael Millett
Tied for Third Place
Honorable Mention Brief Award

ACCOMPLISHMENTS
2012–2013
~continued~

SECOND ANNUAL NATIONAL PROFESSIONAL RESPONSIBILITY MOOT COURT COMPETITION
INDIANAPOLIS, INDIANA
Kevin Crews, Erin Okuno, and Morgan Vasigh
Champions
Best Respondent Brief Award
Best Oralist Preliminary Rounds (Erin Okuno)
Best Oralist Final Round (Erin Okuno)

Adriana Corso, Erin-Elizabeth Dolan, and Michelle Reilly
Finalists
Best Petitioner Brief Award

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
VIENNA, AUSTRIA
Paul Crochet, Meagan Foley, Michael Rothfeldt, Lisa Tanaka, and Alexander Zesch
The Elite 8—Quarterfinalists
Honorable Mention Oralist (Paul)
Honorable Mention Oralist (Meagan)
Honorable Mention Oralist (Alexander)