

## Is the Stolen Valor Act Unconstitutional?

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup> & Andrew Gonyea<sup>3</sup>

### 10.2—Other Supreme Court Case

Two courts have recently held the Stolen Valor Act (SVA) to be unconstitutional. These are the first two prosecutions under this federal law enacted in 2006. Thus, the Department of Justice (DOJ) is 0-2 in SVA prosecutions. It is unclear whether DOJ will appeal either of these two decisions or will continue to prosecute individuals for alleged SVA violations. DOJ has unfettered discretion to decline to prosecute or to decline to appeal. If DOJ goes that route, the SVA will effectively become a dead letter, and that would be most unfortunate.

For decades, it has been unlawful to *wear* a Medal of Honor (MOH) or other military decoration that one has not earned, but until 2006 it was not unlawful to *claim* (in a resume, in a pick-up line, etc.) that one has received such an award. The principal sponsors of the SVA were Senator Kent Conrad (North Dakota) and Representative John Salazar (Colorado). President George W.

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<sup>1</sup>I invite the reader's attention to <https://www.roa.org/page/LawCenter>. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

<sup>2</sup>BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org).

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Bush signed the SVA into law in late 2006. It is now codified in title 18, United States Code, section 704 (18 U.S.C. 704).

In 2007, Xavier Alvarez was a newly-elected board member of the Three Valleys Municipal Water District in Claremont, California. At a board meeting, Alvarez introduced himself to his fellow members and stated, “I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I’m still around.”

In fact, Alvarez never served in any branch of the U.S. military and received no military decorations.<sup>4</sup> The United States Attorney prosecuted Alvarez for his alleged violation of 18 U.S.C. 704. Under a plea agreement between Alvarez’s attorney and the United States Attorney, Alvarez pled guilty but preserved the right to appeal on the question of the constitutionality of the SVA. The District Judge ordered him to pay a \$5,000 fine and a \$100 special assessment, to serve three years of probation, and to perform 416 hours of community service.

Through his attorney, Alvarez appealed to the United States Court of Appeals for the 9th Circuit, the federal appellate court that sits in San Francisco and hears appeals from federal district courts in Alaska, Arizona, California, Guam, Idaho, Montana, Northern Marianas Islands, Oregon, and Washington. As is always the case in federal appellate cases, the case was assigned to a three-judge panel. In this case, the panel consisted of Judge Thomas G. Nelson, Judge Milan D. Smith, Jr., and Judge Jay S. Bybee. All three of them are active judges of the 9th Circuit. On August 17, 2010, the three-judge panel, by a vote of 2-1, held the SVA to be unconstitutional.<sup>5</sup> Judge Smith wrote the majority decision, and Judge Bybee wrote the dissent.

In the majority decision, Judge Smith expressed concern that if the constitutionality of the SVA were upheld many everyday lies could become criminal acts. Judge Smith wrote: “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 on the freeway.” Additionally, Judge Smith noted that, “given our historical skepticism of permitting the government to police the line between truth and falsity, and between valuable speech and drivel, we presumptively protect all speech, including false statements, in order that clearly protected speech may flower in the shelter of the First Amendment.” While not endorsing “an

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<sup>4</sup>Alvarez’s MOH claim was suspect on its face, to any person with even a passing familiarity with recent history. He claimed to have received the MOH for rescuing the U.S. Ambassador in Iran in 1987. The hostage crisis in Iran began in 1979, not 1987, and the United States did not have an ambassador (only a *charges des affaires*) in Iran in 1979, and he (Bruce Laingen) spent the entire 444-day ordeal as a prisoner of the Iranian “students.” The U.S. has not had an embassy or an ambassador in Iran since the 1979-81 hostage crisis. Moreover, Alvarez has a long history of making self-aggrandizing statements that are both false and inherently incredible. For example, he claimed to have played professional hockey for the Detroit Red Wings.

<sup>5</sup>In a similar but unrelated case, the United States District Court for the District of Colorado held the SVA to be unconstitutional. Colorado is in the 10th Circuit, which sits in Denver.

unbridled right to lie,” the majority stated that Congress is limited in its ability to limit freedom of speech to instances where direct and significant harm is reasonably foreseeable. In this case, the majority found no such harm.

In his dissent, Judge Bybee asserted that no proof of harm was needed to limit Alvarez’s untruthful speech, and that the general rule established by the Supreme Court is that false statements of fact are unprotected, with certain limited exceptions to that principle in certain contexts. Judge Bybee wrote, “Alvarez’s knowingly false statement is excluded from the limited spheres of protection carved out by the Supreme Court for false statements of fact necessary to protect speech that matters, and it is therefore not entitled to constitutional protection.”

Judge Bybee also argued that the majority had ignored the most important consideration in this case: that to strike down this act of Congress, there must be a reasonable expectation that the act could result in the unconstitutional prosecution of an individual. Regarding the SVA, Judge Bybee wrote, “no person has ever been subjected to an unconstitutional prosecution under [this Act] and, under any reasonable interpretation of the Act, it is extremely unlikely that anyone ever will be.”

The next step for appeal of this case would be to apply to the 9th Circuit for rehearing *en banc*. If such an application were made and were granted by the court, the case would be reheard by all the active judges of the 9th Circuit. The final step would be to apply to the Supreme Court for *certiorari* (discretionary review). Because this is a criminal case, only DOJ can apply for rehearing *en banc* or for *certiorari*. If DOJ fails to appeal within the limited time provided by the Federal Rules of Appellate Procedure, the decision of the three-judge panel becomes final.<sup>6</sup>

On September 10, 2010, ROA’s Executive Committee adopted Resolution 10-35(I), calling upon DOJ to appeal these unfavorable decisions and to continue to prosecute individuals for falsely claiming to have received military decorations. Under the ROA Constitution, a resolution adopted by the Executive Committee is considered valid until the next convention. A resolution on the SVA will be considered during the National Convention in February 2011.

### **Update – May 2022**

In 2012, the Supreme Court of the United States held that the Stolen Valor Act was unconstitutional because it infringed upon the First Amendment.<sup>7</sup> But, in 2013 President Obama signed into law Public Law 113-12, the Stolen Valor Act of 2013. The Stolen Valor Act of 2013 makes it unlawful to claim falsely to have been awarded a military medal with the intent to obtain some tangible benefit for the liar.

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<sup>6</sup>The Supreme Court has granted *certiorari* (discretionary review) in the Alvarez case, agreeing to review the decision of the United States Court of Appeals for the 9th Circuit, holding the Stolen Valor Act to be unconstitutional. During the current Supreme Court term (October 2011 to June 2012), there will be briefs and oral argument, and there will likely be a decision of the Supreme Court near the end of the current term. We will keep the readers advised.

<sup>7</sup>*United States v. Alvarez*, 567 U.S. 709, 729—30 (2012).

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ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

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