

# THE “NEW” STOLEN VALOR ACT

By Charles P. McDowell

On June 3, 2013 President Obama signed into law an amendment to the Stolen Valor Act (SVA) that was originally passed in 2006. The SVA was introduced on July 19, 2005 by Representative John Salazar (D-Colorado), as H.R. 3352. On November 10, 2005 it was introduced in the Senate by Kent Conrad (D-North Dakota) as S. 1998. The Senate version was passed unanimously on September 7, 2006, and the House passed the Senate version on December 6, 2006. Its announced purpose was to broaden the scope and strengthen the penalties of 18 USC §704. Specific new provisions in the SVA included:

- Granting more authority to federal law enforcement officers;
- Broadening the law to cover false *claims* (previously an overt *act* had to be committed);
- Prohibiting the mailing and shipping of medals; and,
- Protecting the reputation and meaning of medals for military heroism.

The SVA made it illegal for unauthorized persons to *wear, buy, sell, barter, trade, or manufacture* “any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces.” The Orders and Medals Society of America opposed the SVA out of concern that it would criminalize the movement or exchange of medals. The law had two major flaws. The first was in Section (a), which stated:

**(a) In General** — Whoever knowingly wears, purchases, attempts to purchase, solicits for purchase, mails, ships, imports, exports, produces blank certificates of receipt for, manufactures, sells, attempts to sell, advertises for sale, trades, barter, or exchanges for anything of value any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof, except when authorized under regulations made pursuant to law, shall be fined under this title or imprisoned not more than six months, or both.

The Orders and Medals Society of America was correct in its reservations, and this section was crystal clear: it significantly impeded the ability of collectors to pursue their hobby. Many felt the restrictions were too pervasive, invasive, arbitrary, and capricious - and they were right. In the amendment signed by President Obama this section was changed to simply provide that, “whoever, with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration [as described in the amended Act] or medal ... shall be fined under this title, imprisoned not more than one year, or both.”

Section (b) of the original SVA dealt specifically with people who falsely claimed to be recipients of military decorations, and provided as follows:

**(b) False Claims About Receipt of Military Decorations or Medals** — Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or

badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

It was Section (b) that ultimately led to the revision of the Stolen Valor Act, and the case that did it was *United States v. Alvarez*, in which the defendant was charged with violating the law by falsely claiming he had been awarded the Medal of Honor. His lawyers moved to dismiss the charge, claiming the law was unconstitutional because it criminalized speech protected by the First Amendment. Alvarez was convicted and sentenced to three years probation, 416 hours of community service, and required to pay a \$5,000 fine and a \$100 special assessment. Alvarez appealed his conviction, and a three judge panel of U.S. Court of Appeals for the Ninth Circuit decided on August 17, 2010 that the SVA was unconstitutional, holding that lies *not within traditionally unprotected subsets of false facts are subject to First Amendment protection*. The Ninth Circuit ruled that the government had no compelling reason in banning such lies. It said, “The right to speak and write whatever one chooses – including, to some degree, worthless, offensive and demonstrable untruths – without cowering in fear of a powerful government is, in our view, an essential component of the protection afforded by the First Amendment.” If lying about a medal can be classified as a crime, the Court said, “many everyday lies could become criminal acts, such as lying about one’s age, misrepresenting one’s financial status on Facebook, or telling one’s mother falsehoods about drinking, smoking or sex.”

On March 21, 2011 a majority of judges in the Ninth Circuit refused to rehear the *Alvarez* case *en banc*; that is, before all of the judges sitting on the Ninth Circuit. One of the judges upholding that decision, Alex Kozinski, asserted that the First Amendment covers most varieties of lying and misrepresentation, as long as they are not *unprotected* by the First Amendment (such as fraud, fighting words, defamation, incitement, and speech attendant to the commission of a crime).

On October 17, 2011 the U.S. Supreme agreed to consider the validity of the SVA, and on June 28, 2012 found it unconstitutional in a 6 to 3 decision, with Justices Scalia, Thomas and Alito dissenting. The majority held that the SVA was an unconstitutional abridgment of the freedom of speech under the First Amendment. In response, Representative Joe Heck (a Republican from Nevada) introduced H.R. 258 to amend the SVA, eliminating sections (a) and (b), replacing them with the amended wording, which rests solely on the platform of fraudulent representation for gain.

Here’s the problem: the law wanted to punish people who falsely claimed to have been awarded military decorations. At first blush that would appear to be a *fraud*; however, as a matter of law, a fraud must contain several elements. First, there must be the false statement of a material fact; in this case it would be to knowingly misrepresent oneself as the recipient of a military decoration. Second, in making such a claim the person must know it to be false: he has to know he did *not* legitimately receive the decorations. Third, in making the false statement the person making it must intend to deceive those to whom it is made. Now here’s where it gets sticky: there needs to be a justifiable acceptance by the persons to whom the statement was made that it *is* true – it has to be *believed*. And finally, the fifth element is that there must be a harm or injury to the victim as a result of the misrepresentation of fact. But who is the victim in this case? And how is that victim

harmed? Without that final requirement, the misrepresentation is not legally a fraud; it is simply a lie. The court's reasoning pretty much held that a lie not resulting in a material harm is constitutionally protected under the First Amendment. This is why the amended SVA states that "whoever, *with intent to obtain money, property, or other tangible benefit*, fraudulently holds oneself out to be a recipient of a decoration or medal [as described in the amended Act] ... shall be fined under this title, imprisoned not more than one year, or both. (italics added)"

### **Was There an Easier, More Effective Remedy?**

The original SVA was in large measure personality-driven, and its primary architects and advocates were Doug Sterner and his wife Pam, and a now retired FBI agent by the name of Thomas A. Cottone, Jr. Their goal was to expose and punish people who falsely claim to be recipients of military decorations, and to accomplish this they saw the need for tougher, expanded federal legislation. However, the SVA – as it was originally crafted – was seriously flawed. The provisions that prohibited buying, selling, trading, sending, soliciting for sale, and so on were *mala prohibita*; that is, bad only because the law said so. 3

3 The other class of crimes, *mala in se*, are usually common-law crimes that are dangerous to life and limb.

Buying, selling, trading, sending, and soliciting for sale are not misrepresentations in their own right, although engaging in them can be used to facilitate a subsequent misrepresentation. Unfortunately, criminalizing the buying, selling, trading, sending, or soliciting for sale cannot be reasonably seen to play a serious role in *preventing* someone from *claiming* to be the recipient of a military decoration. However, by criminalizing those acts, they could be used to dogpile on suspects by charging them with "related" offenses in support of the predicate offense of misrepresentation. 4

4 This is a lot like pursuing gun control by passing regulations making it difficult to acquire ammunition.

Unfortunately, that issue never made it before the courts because none of the people arrested and convicted for buying or selling medals appealed their convictions. Almost certainly, all of them simply entered into negotiated pleas rather than go to trial, and negotiated pleas are not subject to judicial review. So, without an appeal the constitutional merits of their defense could not be heard. Thus, the SVA was overturned for an entirely different reason: falsely claiming to have been awarded a decoration.

### **What About *False Personation*?**

Falsely assuming the identity of another person to gain some benefit or to cause harm to the other person is known as *false personation*. Laws have been enacted at both the state and federal levels to protect the dignity, reputation, and economic well-being of individuals from being impersonated.<sup>5</sup>

5 In recent years this has become a major issue under the now-current heading of "identity theft."

False personation can involve as little as passing oneself off as another person; however, there is a catch. In general, the person impersonated has to be real and the benefit or harm sought by impersonators can take many forms. There is an exception however: the law may also seek to protect a particular group or profession. Thus, for example, many states have laws that prohibit the impersonation of police officers and other classes or groups of people.<sup>6</sup>

<sup>6</sup> Other classes might include such people as physicians or other members of a licensed profession.

### **False Personation at the Federal Level:**

Chapter 34 of Title 18 of the United States Code deals with false personation, and 18 USC §912 defines two separate and distinct offenses: (1) impersonation while acting as such, and (2) impersonation coupled with demanding or obtaining something of value in connection with being the pretended character. False personation of an officer or employee of the United States is an element of both offenses. The impersonation must be of a federal officer and may be done by *verbal declaration* as well as by flashing a badge or presenting false identification.<sup>7</sup>

<sup>7</sup> See for example, *Massengale v United States*, 240 F.2d 781, 782 (6th Cir. 1957) and *Pierce v United States*, 86 F.2d 949, 951 (6th Cir 1936).

Government officials are impersonated by any person who acts in the pretended character and thus *action alone* may amount to a false pretense of federal authority. It could be argued that a person who falsely claims to be the recipient of the Medal of Honor or other military decoration is impersonating a class of current or former federal officers consisting of military personnel who have been awarded the Medal of Honor (or other decorations). It could be further argued that making such a false claim is done for the purpose of enhancing the impersonator's own reputation to the collective detriment of legitimate recipients. This reasoning is not currently a matter of law and if enacted would almost certainly be tested in the courts where it would most likely be regarded as a first impression.<sup>8</sup>

<sup>8</sup> A "first impression" is a completely original issue of law for decision by the courts.

However, it is entirely possible that the original problem could have been solved by adding a new, carefully worded section to Chapter 34 of the United States Code. The new amendment to the SVA now requires the person making the false claim to use it in order to obtain money, property, or some other *tangible* benefit. That does not include making the false claim simply to impress someone else. As a result 18 USC §704 is only partly effective, and the larger part of the problem – a false claim without a *material gain* - remains unaddressed. That takes us pretty much back to square one.

### **The Bottom Line for Collectors**

- It is not "against the law" to own or possess *any* military decoration, including the Medal of Honor.
- It is not "against the law" to sell, offer to sell, trade, purchase, offer to purchase, import or export any military decoration, including the Medal of Honor.
- It is not "against the law" to mail, ship, or otherwise physically convey any

military decoration, including the Medal of Honor.

- It is not “against the law” to lie about being the recipient of any military decoration, unless doing so “with intent to obtain money, property, or other tangible benefit...”

Unfortunately, the basic problem of “stolen valor” remains with us. However, those who falsely claim to be the recipient of a military decoration must tread a very thin line. The meaning of “other tangible benefit” will undoubtedly be tested in the courts in future cases. At least the most obnoxious and capricious sections of the original Stolen Valor Act have been removed.

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## CONCLUSION

Here is the holding of the US Court of Appeals for the Ninth Circuit Court

In order to advance Congress’s praiseworthy efforts to stop fraudulent claims about having received Congressionally authorized military honors, the government would have us extend inapposite case law to create an unprecedented exception to First Amendment guarantees. We decline to follow such a course, and hold that the Act lacks the elements that would make it analogous to the other restrictions on false speech previously held to be proscribable without constitutional problem. **Accordingly, we hold that the Act is not narrowly drawn to achieve a compelling governmental interest, and is unconstitutional.**

REVERSED. The case is REMANDED to the district court for proceedings consistent with this opinion.

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Comment:

The Spirit of Title 18 of the US Code has been to prevent or limit impersonation. There are a number of other organizations protected by it that must have also had this problem. There will be other opinions by individuals with and without a legal background as to their individual interpretation of this ruling. Individuals who try to openly sell unnamed modern Medals of Honor, that could be used for impersonation, may still suffer harassment from government agencies. This could be done by merely opening a case forcing the subject to pay a significant amount for legal defense services. Awarded attributed Medals of Honor become the recipients personal property and that of their heirs. Named awards cannot be readily used for impersonation and should be legally available to collectors as described above.