



March 13, 2013

Honorable Robert W. Goodlatte
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Honorable John Conyers, Jr.
Ranking Member
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

Re: ACLU Opposes Stolen Valor Act, H.R. 258

Dear Chairman Goodlatte and Ranking Member Conyers:

We write to offer you our views on the Stolen Valor Act of 2013 in advance of the House Judiciary Committee's markup this Thursday.¹ While the ACLU continues to oppose the Stolen Valor Act, we urge the Committee, at a minimum, to clarify—either through legislative history or amendment—that the bill is only meant to cover “completed” frauds, where an individual has justifiably relied on a material falsehood about a military decoration and suffered serious harm.

We appreciate the efforts to improve the bill to reflect the constitutional problems identified by the Supreme Court in *United States v. Alvarez*.² However, the proposed federal crime in this legislation remains unnecessary and overly punitive, continues to raise constitutional concerns, and may easily be misused to prosecute non-fraudulent activity. Expressly limiting the scope of the legislation to common law fraud would significantly ameliorate potential unintended consequences.³

This is the second iteration of the Stolen Valor Act. The first was struck down by the Supreme Court last year as a content-based restriction on speech that was not “actually necessary” to advance the government's interests in “recognizing and expressing gratitude for acts of heroism and

¹ H.R. 258, 113th Cong. (2013).

² 132 S. Ct. 2537 (2012).

³ Though we would continue to have concerns with the bill because legitimate fraud is already actionable under various state and federal laws.

sacrifice in military service” and in “fostering morale, mission accomplishment and esprit de corps among service members.”⁴ The Court found that counter-speech would be effective in eliminating any harm from false statements like those at issue in *Alvarez*, and that the government could more effectively address false claims concerning military decorations by creating a public database listing medal recipients.⁵ The Court’s recognition that the answer to falsehoods about military service or decorations is remedial speech—not the creation of a new federal crime—remains compelling here, and the interests of the First Amendment would be better served by Congress allocating funding for a public database of all military decorations.

The revised Stolen Valor Act does attempt to narrow the scope of the law by criminalizing only “fraudulent” representations made with “intent to obtain money, property, or other tangible benefit.”⁶ The elements of this new crime, however, are unclear. We therefore strongly urge the Committee to recognize expressly through amendment or in the legislative history that this legislation is intended to cover a “completed” fraud, where an individual has, in fact, succeeded in securing a material benefit through a material misrepresentation.⁷

Importantly, the plain text of the bill differs from the federal mail, wire or bank fraud statutes, which cover “scheme[s] or artifice[s]” to defraud and thus do not require proof of justifiable reliance or injury (though they require that the misrepresentation be material).⁸ As the Supreme Court reasoned in *Neder*, unless expressly stated, federal criminal fraud statutes are meant to “incorporate the established meaning” of common law fraud.⁹ Because the federal wire, mail and bank fraud statutes refer to a “scheme or artifice,” the Court held, they are inconsistent with the common law requirements of justifiable reliance and actual damages (that is, the crime is literally “scheming” to defraud and not the actual fraud).¹⁰

There would be no such inconsistency under the statute as currently drafted. By using the phrase “*fraudulently* holds oneself out,” the language is entirely consistent with the common law elements of a completed fraud. The legislative history or an amendment to the bill should clarify that the government in a Stolen Valor prosecution would be required to prove:

⁴ *Id.* at 2548 (internal quotation marks omitted).

⁵ *Id.* at 3549-51.

⁶ H.R. 258 § 2(a).

⁷ The “tangible benefit” language in the proposed bill is too broad. As noted below, it could cover something as innocent as a date. We urge the Committee to clarify that any benefit must be material.

⁸ *Neder v. United States*, 527 U.S. 1, 24-25 (1999).

⁹ *Id.* at 21-22.

¹⁰ *Id.* at 25 (“By prohibiting the ‘scheme to defraud,’ rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted. But while the language of the fraud statutes is incompatible with these requirements, the Government has failed to show that this language is inconsistent with a materiality requirement.”).

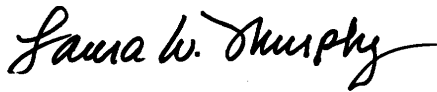
1. The misrepresentation was knowing and material;
2. The defendant had the specific intent to defraud;
3. Another person relied on the misrepresentation;
4. That reliance was justified;
5. And, injury proximately resulted from the misrepresentation.¹¹

If Congress fails to clarify that this legislation is limited to actual fraud, the legislation poses the same constitutional infirmities as the first Stolen Valor Act. The bill is plainly a content-based restriction on speech (it only covers false statements about military decorations), which will only be permitted in the narrow categories of speech that have traditionally received less First Amendment protection like fraud.¹²

Finally, as a matter of basic fairness, this bill's scope must be limited to the genuine fraudster, and not to individuals who are engaged in merely obnoxious or hyperbolic speech. Unless the Committee clarifies that this is only meant to apply to actual fraud, and without some statutory limitation on what constitutes a "tangible benefit," the bill could be misused to apply to white lies used to secure, for instance, a free drink in a bar or getting off with a warning at a traffic stop. Misrepresentations in these cases are certainly unseemly, but they should not rise to the level of a federal crime.

Please do not hesitate to contact Gabe Rottman, legislative counsel/policy advisor in the ACLU's Washington Legislative Office, at 202-675-2325 or grottman@dcacclu.org with any questions.

Sincerely,



Laura W. Murphy
Director, Washington Legislative Office



Gabriel Rottman
Legislative Counsel/Policy Advisor

cc: Members of the House Judiciary Committee

¹¹ See Restatement (Second) of Torts §§ 525-549 (2012).

¹² *Alvarez*, 132 S. Ct. at 2544 ("Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.").