No. 11-116

IN THE

Supreme Court of the United States

OTIS GARFIELD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE AMES CIRCUIT

JOINT APPENDIX

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Ames Daily Tribune

March 2, 2011 **Morning Edition** **$1.50**

Navy SEAL Poser Indicted for Stolen Valor Act Violation

By: Selma Jones

For Ames City resident Laura Morrison, dinner with Otis Garfield was not just a date ─ it was an honor. "Here I am, thinking I'm going out on the town with a bona fide war hero," Morrison said. "He said he was a Navy SEAL who dismantled mines during the Gulf War. He claimed he was awarded the Navy Cross."

Morrison met Garfield on the popular dating website AmesDate.com, and exchanged several e-mails with him before they arranged to meet in person. But when the dinner date finally occurred, Morrison realized that Garfield was not all that he had appeared to be online. "The first tip off was his height," Morrison said. "His profile said he was 6'1". But he couldn't have been more than 5'9." Morrison soon began to wonder whether the other things Garfield had said about himself were true. Had he really climbed Mount Kilimanjaro ─ twice? Was he actually related to President James A. Garfield? And was he really a military hero?

The answer to the last question, as Garfield now freely admits, is no. Garfield did not see combat and did not earn the Navy Cross. Indeed, Garfield never served in the military at all. According to Garfield's counsel, Gillian Gillihan, "these were little white lies that got out of hand."

But federal authorities think they were something much more. After following up on a tip from Morrison and viewing Garfield's AmesDate.com profile, prosecutors decided to charge Garfield with violating the Stolen Valor Act. That federal law makes it a crime for a person to falsely represent that he has been awarded any military decoration or medal. Violators face up to six months in prison, and that term can be increased to one year if certain decorations, including the Navy Cross, are involved.

Gillihan is convinced that the indictment will be dismissed. "This law punishes pure speech," she said. "And that isn't allowed under the First Amendment."

But Morrison hopes Garfield will be convicted and punished. "Some lies are worse than others," she said. "Otis told me he'd call me after the date but he never did ─ and I wouldn't make that a crime. But lying about receiving a Navy Cross? I hope they throw the book at him."

BACKGROUND ON THE NAVY CROSS

The Navy Cross is the second highest decoration bestowed by the Department of the Navy, ranking below only the Medal of Honor. Instituted in 1919, the Navy Cross is awarded to military personnel and civilians who display extraordinary heroism in action. To earn the honor, an individual must perform an act of heroism under great danger and in a manner that distinguishes the recipient from others of equal rank or position of responsibility.

SUPREME COURT OF THE UNITED STATES

ORDER LIST

Certiorari Granted

September 15, 2011

11-116 Garfield v. United States

The petition for a writ of certiorari is granted on the following two questions:

1. Whether the Stolen Valor Act, 18 U.S.C. § 704(b), (d), is invalid as applied to petitioner under the Free Speech Clause of the First Amendment.

2. Whether petitioner is entitled to resentencing because the District Court deprived him of his right to speak at sentencing, in violation of Federal Rule of Criminal Procedure 32(i)(4)(A)(ii).

UNITED STATES COURT OF APPEALS
FOR THE AMES CIRCUIT

UNITED STATES OF AMERICA	
v.	Docket No. 11-7740
OTIS GARFIELD	

Before Diamond, Jenkins, and Brown, Circuit Judges.

PER CURIAM:

Defendant-Appellant Otis Garfield appeals his conviction and sentence for one count of falsely claiming in writing to have received the Navy Cross, in violation of the Stolen Valor Act, 18 U.S.C. § 704(b), (d) ("the Act"). After the District Court denied Garfield's motion to dismiss the indictment on free speech grounds, Garfield conditionally pleaded guilty, reserving his right to appeal the Act's constitutionality. At sentencing, the District Court violated Federal Rule of Criminal Procedure 32(i)(4)(A)(ii) by failing to personally address Garfield before imposing sentence to determine whether he wished to make a statement or present any information in mitigation of the sentence. The court sentenced Garfield to three months' imprisonment, six months' supervised release, and a fine of $500.

Garfield raises two issues on appeal. First, he argues that his conviction must be reversed because the Stolen Valor Act violates the First Amendment as applied to him. Second, he contends that he is entitled to resentencing because the District Court failed to give him an opportunity to allocute. We disagree on both scores, and we therefore affirm.

I.

In January 2011, Garfield created a profile on the popular dating website AmesDate.com under the user name "PrezGarfield." Garfield represented himself as a relative of the late

President James A. Garfield, and as an adventurous world traveler who had tracked lions in Botswana as a veterinary school student; climbed Mount Kilimanjaro; taught English to Liberian schoolchildren as a Peace Corps volunteer; and served his country as a Navy SEAL during the Gulf War, for which he received the Navy Cross.

In actuality, Garfield has never been awarded the Navy Cross, nor has he spent a single day as a Navy SEAL or in the service of any other branch of the United States Armed Forces. Indeed, Garfield's profile was nothing but a string of falsehoods. As he now openly admits, he did not attend veterinary school; he was not a Peace Corps volunteer; he has never traveled outside the United States; and he is not related to President Garfield.

Garfield's misrepresentations on AmesDate.com were only the latest in a long history of fabrications. In an earlier incident, Garfield impersonated an Ames University Campus Police officer and attempted to arrest a group of students smoking marijuana in a park. In another, Garfield was temporarily cast on a reality television show until producers conducting a background check discovered that nearly all of the claims in his application were untrue.

Garfield's AmesDate.com profile came to the attention of the FBI at the tip of a woman who had corresponded with him online, met him for dinner, and come to suspect that he was not being truthful about his military service. After federal officers investigated that allegation, Garfield was indicted on one count of violating the Stolen Valor Act. Specifically, he was charged with "falsely represent[ing] in writing that he had been awarded the Navy Cross when, in truth as he knew, he had not received the Navy Cross."

Garfield moved to dismiss the Indictment, claiming that the Act is unconstitutional as applied to him. The District Court denied the motion. Garfield then pleaded guilty, expressly reserving his right to appeal the First Amendment question.

The District Court held a sentencing hearing on May 23, 2011. At the outset of that hearing, the judge stated:

> I'll hear first from the Government regarding sentencing, and then I'll hear from the defense. And of course, Ms. Gillihan, your client, Mr. Garfield, has the right to speak; that is, to say whatever it is he wants to say to help me in determining what the sentence should be.

After the Government's presentation, the District Court asked defense counsel, "Ms. Gillihan, do you have a presentation you'd like to make?" Defense counsel began by reading a letter that Garfield had prepared. In the letter, Garfield admitted to his conduct. But he also explained that he felt no remorse for his actions, stating, "I am not sorry for what I did. The true criminal here is the United States government, which fights unnecessary wars and lies to the American people about its motivations. I am proud to spread that message however, wherever, and whenever I can." The letter then requested a merciful sentence.

After defense counsel's presentation, the District Court sentenced Garfield to three months' imprisonment, six months' supervised release, and a $500 fine. Before pronouncing the sentence, the District Court did not address Garfield personally and offer him the opportunity to speak. Garfield did not object to the court's failure to ask him whether he wanted to allocute.

Garfield timely noted this appeal.

II.

Garfield brings an as-applied challenge to the validity of the Stolen Valor Act, 18 U.S.C. §704(b), (d), under the First Amendment. We review that constitutional question de novo.

The Act states:

> 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.

Id. § 704(b). The Act provides enhanced penalties for violations involving certain types of military honors, including, of particular relevance to this case, the Navy Cross. *Id.* § 704(d).

Federal courts have struggled with whether the Act violates the First Amendment. The Ninth Circuit recently held that it does. *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010), *reh'g and reh'g en banc denied*, 638 F.3d 666 (9th Cir. 2011). Likewise, the District Court for the District of Colorado has declared the Act unconstitutional. *United States v. Strandlof*, 746 F. Supp. 2d 1183 (D. Colo. 2010). But the Western District of Virginia ─ and our own District Court below ─ have upheld the Act against a First Amendment challenge. *United States v. Robbins*, 759 F. Supp. 2d 815 (W.D. Va. 2011); *United States v. Garfield*, No. CR 11-512 (D. Ames May 2, 2011).

We consider it a close and difficult question whether the Act violates the First Amendment, but we ultimately find the statute constitutional for the reasons stated by the District Court below and by the dissenting judges in *Alvarez*. *See Alvarez*, 617 F.3d at 1218-41 (Bybee, J., dissenting); *Alvarez*, 638 F.3d at 676-89 (O'Scannlain, J., dissenting from denial of rehearing en banc); *id.* at 687-88 (Gould, J., dissenting from denial of rehearing en banc). Garfield's claim to have received the Navy Cross is a false statement of fact not protected by the First Amendment. Accordingly, there is no need to subject the Stolen Valor Act to strict scrutiny, and we hold that the Act is constitutional as applied in this case.

III.

We next consider Garfield's argument that the denial of his right of allocution requires vacatur of his sentence and a remand for resentencing. As an initial matter, we note that the parties agree that the District Court failed to comply with Federal Rule of Criminal Procedure

32(i)(4)(A)(ii), which states that, prior to imposing sentence, "the court must . . . address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." Although the District Court noted Garfield's right to allocute at the outset of the sentencing hearing, the judge never personally addressed Garfield and invited him to speak; accordingly, the court clearly erred. *See Green v. United States*, 365 U.S. 301, 305 (1961) (plurality opinion) ("[T]rial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing"). That Garfield's counsel read aloud a letter written by Garfield does not cure this error, for "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Id.* at 304.

The parties dispute the analysis we should employ to determine the consequences of the court's error. Citing *United States v. De Alba Pagan*, 33 F.3d 125, 130 (1st Cir. 1994), and *United States v. Walker*, 896 F.2d 295, 301 (8th Cir. 1990), Garfield contends that denial of the right to allocution requires automatic vacatur and a remand for resentencing. Alternatively, relying on *United States v. Gunning*, 401 F.3d 1145, 1149, n.6 (9th Cir. 1995), Garfield argues that we should reverse on harmless error review. Finally, Garfield contends that he is entitled to relief even under a plain error standard. The Government, for its part, contends that we must review for plain error because Garfield did not object to the error at sentencing. *See United States v. Olano*, 507 U.S. 725, 732-37 (1993); Fed. R. Crim. P. 52(b). The Government acknowledges that several circuits using a plain error standard in this situation have adopted a presumption that the denial of allocution affected the defendant's substantial rights. *See, e.g.*, *United States v. Haygood*, 549 F.3d 1049, 1055 (6th Cir. 2008); *United States v. Carruth*, 528 F.3d 845, 847 (11th Cir. 2008); *United States v. Reyna*, 358 F.3d 344, 352 (5th Cir. 2004) (en

banc); *United States v. Adams*, 252 F.3d 276, 287-88 (3d Cir. 2001); *see also Olano*, 507 U.S. at 735 (recognizing that some errors may be presumed "prejudicial if the defendant cannot make a specific showing of prejudice"). But the Government urges us to reject such a presumption and instead leave the burden on the defendant to demonstrate prejudice. *See, e.g.*, *United States v. Noel*, 581 F.3d 490, 504-06 (7th Cir. 2009) (Easterbrook, J., concurring); *Reyna*, 358 F.3d at 354-56 (Jones, J., concurring).

As the parties' citation of precedent suggests, "the federal courts have been quite active in interpreting [the right of allocution] and in fashioning various tests for determining on direct appeal when a violation of the right should result in resentencing." *Adams*, 252 F.3d at 282; *see id.* at 282 n.4 (describing "five different tests that have gained favor in [the] circuit courts of appeal"); *Reyna*, 358 F.3d at 351 n.6 (discussing disagreement in the circuits). Reviewing these various approaches, we find the en banc Fifth Circuit's reasoning in *Reyna* most persuasive. The court there determined that plain error review applies, but it adopted a presumption that the allocution error affected the defendant's substantial rights. *See Reyna*, 358 F.3d at 350, 352. We find this test pragmatic and sound, and we adopt it for the reasons stated in *Reyna*.

The task remains of applying this test here. For Garfield to prevail under the plain error standard, we must determine that error: (1) occurred; (2) was plain; (3) affected the defendant's substantial rights; and (4) seriously affected the fairness, integrity, or public reputation of the proceeding. *Olano*, 507 U.S. at 732. There is no question that the first two criteria are satisfied: the District Court committed plain error by failing to offer Garfield the opportunity to allocute. Moreover, because Garfield conceivably could have received a shorter sentence than three months' imprisonment, we presume that the allocution error affected his substantial rights. To be sure, Garfield has not submitted on appeal that he would have said anything different at

sentencing than what he wrote in his letter. But presuming prejudice in this situation saves us from speculating about what Garfield might have said — and how the District Court might have responded — had no allocution error occurred.

Although we presume prejudice, we nevertheless find that Garfield is not entitled to resentencing because the error did not seriously affect the fairness of the judicial proceedings. *See Reyna*, 358 F.3d at 352. Although the District Court judge did not address Garfield personally, she did mention his right to allocute at the beginning of the sentencing hearing. Moreover, Garfield's own words were read out loud at that hearing. In light of these considerations, the allocution error strikes us as technical only. Finally, we note that Garfield faced up to one year of imprisonment but received only a three-month term. Based on the facts of this case, we conclude that the fairness and integrity of the sentencing process remains unharmed despite the denial of allocution. *See Noel*, 581 F.3d at 501-04 (refusing to grant the defendant relief on similar facts). We therefore decline to exercise our discretion to remand for resentencing, and we instead affirm Garfield's sentence.

IV.

For the reasons stated above, the judgment of the district court is

AFFIRMED

FILED: JULY 18, 2011

United States District Court
District of Ames
UNITED STATES OF AMERICA,
v.
Otis Garfield
No. CR _____
March 1, 2011

U.S. District Court
District of Ames
FILED
March 1, 2011

INDICTMENT

The Grand Jury in and for the District of Ames, sitting at Ames City, charges:

COUNT ONE

False Claims About Receipt of Military Decorations or Medals

In or about January 2011, in the District of Ames, defendant OTIS GARFIELD did knowingly falsely represent himself in writing to have been awarded a decoration or medal authorized by Congress for the Armed Forces of the United States; that is the defendant falsely represented that he had been awarded the Navy Cross when, in truth as he knew, he had not received the Navy Cross, in violation of Title 18, United States Code, Section 704(b) and (d).

A TRUE BILL

Dominic Denton
FOREPERSON

RICHARD TRESSEL
UNITED STATES ATTORNEY, District of Ames

By: *Emily Crowl*
Emily Crowl
Assistant United States Attorney

United States District Court
District of Ames
UNITED STATES OF AMERICA,
v.
Otis Garfield
No. _____
February 16, 2011

CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date of 1/10/2011 in the county of Ames in the State and District of Ames, the defendant violated 18 U.S.C. § 704(b) and (d), an offense described as follows: False Claims about Receipt of Military Decorations or Medals.

This criminal complaint is based on these facts:

Continued on the attached sheet.

Harold Mims
Complainant's signature

Harold Mims, Task Force Officer
Printed name and title

Sworn to before me and signed in my presence.

Date: February 16, 2011

Joseph Robert
Judge's signature

City and State: Ames City, Ames

Joseph Robert, Magistrate Judge
Printed name and title

United States District Court
District of Ames

UNITED STATES OF AMERICA	
v.	No. _____
OTIS GARFIELD	

AFFIDAVIT OF HAROLD MIMS

I, Harold Mims, Task Force Officer, Federal Bureau of Investigation (FBI), Department of Justice, being duly sworn, do hereby depose and state the following:

The affiant is a detective for the Ames Police Department, Ames City, Ames, and has been so employed as a law enforcement officer for approximately fourteen years. The affiant is currently assigned as a Federal Task Force Officer for the Federal Bureau of Investigation, Ames Safe Streets Task Force in Ames City, Ames. The affiant's principal duties involve investigations into violations of federal law in the District of Ames. The affiant is providing this affidavit in support of the Government's application for an arrest warrant for Otis Garfield. Based upon the results of the investigation described herein, the affiant has cause to believe that Garfield committed the following federal offense: False claims about receipt of military decorations or medals, in violation of 18 U.S.C. § 704(b), (d).

On or about January 28, 2011, citizen Laura Morrison contacted the Ames FBI and provided information that Otis Garfield was falsely representing himself as a former Navy SEAL and Navy Cross recipient. Morrison reported that Garfield had posted a profile including this information on the website AmesDate.com. After meeting Garfield in person, Morrison stated that she began to suspect that he was not being truthful about his military service. Morrison stated that she searched public databases and could not find a record that an individual named Otis Garfield had received a Navy Cross.

After receiving this information, the affiant viewed a copy of Otis Garfield's AmesDate.com profile. The affiant noticed that the profile stated that Garfield had served in the Peace Corps in Liberia in the late 1990s and that Garfield had attended veterinary school at Ames University. The affiant checked public records and confirmed that the Peace Corps did not send volunteers to Liberia in the late 1990s. The affiant also contacted Ames University officials. One of those officials searched school attendance records and stated that Garfield had never been a student in the veterinary program, but he recalled that an individual named Otis Garfield had once impersonated an Ames University Campus Police officer.

By viewing Garfield's AmesDate.com profile, the affiant confirmed that the profile stated that Garfield had received a Navy Cross. The affiant then contacted several military officials, who responded that no one by the name of Otis Garfield had ever served in the military or received a Navy Cross.

On February 15, 2011, the affiant interviewed Otis Garfield regarding the above claim. Garfield stated that he was not a Navy SEAL, that he had never served in the military in any capacity, and that he had not been awarded a Navy Cross. Garfield said that none of the information contained in his AmesDate.com profile was true. He said that he had not attended veterinary school; that he had not been a Peace Corps volunteer; that in fact he had never traveled outside the United States; and that he was not related to President Garfield, as the profile claimed. Garfield reported that he had corresponded with approximately sixteen women who had reached out to him after viewing his AmesDate.com profile. Garfield stated that when these women asked him about his military service, he took the opportunity to convey an anti-war message. Garfield stated that he had enjoyed dating women he met on AmesDate.com, and that he had begun dating seriously one person he met on the website.

In addition to interviewing Garfield, the affiant interviewed several other witnesses who had direct contact with Garfield after viewing his AmesDate.com profile. Many of these witnesses stated that Garfield had spoken about his service as a Navy SEAL and had described actions he allegedly took as a SEAL, including dismantling mines and rescuing wounded comrades. These witnesses confirmed that Garfield had described to them at length his objections to current U.S. military actions.

The affiant hereby swears and affirms that the preceding information is true and correct to the best of my knowledge and belief.

Harold Mims

Harold Mims
Federal Task Force Officer
Federal Bureau of Investigation
Ames Safe Streets Task Force

Sworn and subscribed before me
on this 16th day of February, 2011.

Joseph Robert

U.S. Magistrate Judge
District of Ames

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF AMES

UNITED STATES OF AMERICA v. OTIS GARFIELD	Docket No. CR 11-512

MEMORANDUM OF DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

Defendant Otis Garfield moves, under Federal Rule of Criminal Procedure 12, to dismiss the Indictment charging him with violating the Stolen Valor Act, 18 U.S.C. § 704(b), (d), on the ground that the law violates the First Amendment's Free Speech Clause. For the reasons that follow, the court denies this motion.

I. BACKGROUND

The Indictment charges the defendant with one count of violating the Stolen Valor Act ("the Act"). The Act prohibits a person from making false claims about the receipt of a military decoration or medal. According to the Indictment, the defendant allegedly falsely represented that he had been awarded the Navy Cross. In his Motion to Dismiss, the defendant contends that the Act is invalid as applied to him because it is a content-based restriction on speech. In response, the Government argues that the false statements regulated by § 704(b) fall outside the First Amendment's protection.

II. DISCUSSION

Although the First Amendment broadly protects "the freedom of speech," *U.S. Const. amend. I*, recognized categories of speech are excluded from the provision's coverage. One of

those categories involves falsity. The Supreme Court has observed that "there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). From defamation, *see id.*, to fraud, *see Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003), to advertising, *see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976), the Court has generally excluded false statements of fact from First Amendment scrutiny. Indeed, the Court has accorded First Amendment protection to falsehoods only when necessary "to protect speech that matters." *Gertz*, 418 U.S. at 341; *see also BE & K Constr. Co. v. NLRB.*, 536 U.S. 516, 531 (2002) ("[F]alse statements [are] unprotected for their own sake.").

The defendant contends that his misrepresentations were part of a broader anti-war message and that they therefore merit protection as political speech. But false statements are not necessarily protected under the First Amendment even when they are political in nature. As the Supreme Court observed in *Garrison v. Louisiana*, 379 U.S. 64 (1964):

> That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected . . . Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Id. at 75. *Garrison* proves that the mere classification of speech as "political" does not automatically trigger First Amendment scrutiny. But even if the analysis turns on whether the words at issue qualify as political speech, it is not clear that the defendant's false claim about receiving the Navy Cross falls within this category. This misrepresentation appeared on a dating website, surrounded by other falsehoods intended to make the defendant more attractive to members of the opposite sex. The defendant did not just lie about his military service; he lied about his relationship to President Garfield, his time spent in veterinary school, his athleticism,

and his world travel. These lies were part of a carefully calculated scheme to help the defendant meet women online. This is not the kind of "speech that matters" that merits constitutional protection.

Moreover, the defendant's speech does not appear to implicate the kind of concerns that have led to protection of false statements in other contexts. Applying the First Amendment to these lies is not necessary to prevent a chilling effect on legitimate speech. *See United States v. Robbins*, 759 F. Supp. 2d 815, 820-21 (W.D. Va. 2011). Nor would First Amendment protection here actually promote truth and legitimacy, in contrast to protection for parody and hyperbole. *Id.* And finally, there is no likelihood that a political majority might use the Act to censor protected speech or discriminate on the basis of viewpoint. *Id.*

The court sympathizes with the defendant's concern that upholding the Act might permit criminalization of lying about such matters as one's height or educational background. But there is no realistic possibility that the Government will seek to regulate statements on those topics. And if it did, First Amendment doctrine, with all its nuances, might lead to a different result.

Because the defendant's statement does not fall within the First Amendment's coverage, the statute under which he is being prosecuted is not unconstitutional as applied in this case.

III. CONCLUSION

In light of the foregoing analysis, the court **DENIES** defendant's motion to dismiss.

Dated: May 2, 2011

Karen L. Black
United States District Court
For the Ames District

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF AMES

UNITED STATES OF AMERICA v. OTIS GARFIELD	Docket No. CR 11-512

DEFENDANT'S MOTION TO DISMISS THE INDICTMENT AND MEMORANDUM IN SUPPORT

Defendant, Otis Garfield, by his counsel Gillian Gillihan, hereby moves this Court for an order dismissing the Indictment against the defendant because 18 U.S.C. § 704 is unconstitutional as applied to him in that it abridges his freedom of speech.

By January 2011, defendant had posted a description of himself on the website AmesDate.com. A copy of that posting is attached as Exhibit A. In his profile, defendant represented that he was a former Navy SEAL who had fought in the Gulf War and had earned a Navy Cross to reward his extraordinary heroism. The profile also stated:

> I grew to realize that loving America means speaking out against ─ not fighting in ─ unnecessary wars. We were wrong to be in Iraq then, and we shouldn't be there now. Deception of the American people for political gain is itself a weapon of mass destruction. Because of who I am, where I've been, and what I've seen, I will work to spread this message until I meet my end.

Defendant's representations about his military background were not true; in fact, he has never served in the military and he was not awarded a Navy Cross. But defendant's opposition to the war in Iraq is completely sincere. Indeed, defendant corresponded with several people who viewed his AmesDate.com profile, and, in line with his vow to "work to spread [his] message," he informed them of his objections to U.S. military actions.

There is no question that the Stolen Valor Act, as applied in this case, criminalizes pure speech. To be sure, it punishes only false speech. But because false statements of fact are "inevitable in a free debate," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), the Supreme Court has held that the First Amendment protects "some falsehood in order to protect speech that matters," *id.* at 341. *See also Brown v. Hartlage*, 456 U.S. 45, 60-61 (1982) ("Erroneous statements . . . must be protected if the freedoms of expression are to have the 'breathing space' they need to survive.").

The Court's free speech jurisprudence cannot reasonably be read to exclude the kind of speech at issue in this case. Defendant lied about his military service in order to convey a political message. He enjoyed increased legitimacy and gained greater exposure for his anti-war message by pretending that he had been a military hero. Moreover, because defendant's statements were autobiographical, the speech was "intimately bound up with a particularly important First Amendment purpose: human self-expression." *United States v. Alvarez*, 638 F.3d 666, 674 (Kozinski, J., concurring in denial of rehearing en banc); *see also id.* at 677 ("If the First Amendment is to mean anything at all, it must mean that people are free to speak about themselves and their country as they see fit without the heavy hand of government to keep them on the straight and narrow."). Equally troubling, if the Government may impose criminal sanctions for lies of this type, there is no way to limit its ability to criminalize other falsehoods. Today defendant may be punished for falsely claiming to have received the Navy Cross. But tomorrow he may be sent to jail for lying about his height or his educational background. The Free Speech Clause cannot tolerate a freewheeling governmental power to criminalize false statements of fact. Accordingly, defendant's statements about his military service are entitled to full First Amendment protection.

Because the Stolen Valor Act constitutes a content-based restriction on speech that does not fall outside the First Amendment's coverage, this court should apply strict scrutiny and find the statute unconstitutional as applied to defendant. *See Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991) (content-based restrictions are "presumptively inconsistent with the First Amendment"). Congress enacted the Stolen Valor Act because it believed that "[f]raudulent claims surrounding [military medals] damage the reputation and meaning of such . . . medals." *See* 18 U.S.C § 704. This kind of symbolic interest does not count as compelling for strict scrutiny purposes. *Cf. Texas v. Johnson*, 491 U.S. 397, 417 (1989) (holding that a state interest in prohibiting flag burning to protect the flag as a symbol of nationhood did not rise to the level of a compelling state interest). Moreover, the Act is not narrowly tailored to serve this reputational interest because the Act's application is not limited to those who knowingly or fraudulently make false statements; instead, the Act sweeps in every falsehood, regardless of knowledge, intent, or motive.

Because the Stolen Valor Act is invalid as applied to defendant, the Indictment should be dismissed.

Respectfully Submitted,

Otis Garfield

By: *Gillian Gillihan*

Gillian Gillihan
Federal Public Defender Service
Ten Ames Square
Ames City, Ames 11111

Dated: March 28th, 2011

EXHIBIT A

AmesDate.com

Home | Search | Messages

PrezGarfield
Seeking love at first byte . . . .

Vital Stats
Age: 41
Location: Ames City, Ames
Height: 6'1"
Body type: Athletic
Relationship status: Never married
Ethnicity: White/Caucasian

Three words that best describe me
Adventurous, zany, sincere

Me, in a nutshell:

They say that life is stranger than fiction, and I've found that to be true — so be prepared for me to lead you on a fun and crazy ride. I've tracked lions in Botswana (during my time in veterinary school at Ames University); run four marathons on three continents (North America; Australia; and Asia); completed a two-year stint in Liberia in the late 1990s as a Peace Corps volunteer (teaching English to schoolchildren); and climbed Mount Kilimanjaro . . . twice (the Lemosho and Machame routes). My thirst for adventure and my pride in my country inspired me to join the Navy straight out of high school. I finished my SEAL training in 1988, and I was in the gulf when Iraq invaded Kuwait in August 1990. And that's when I saw what war is all about. I helped rescue downed pilots. I was dropped from an SH-60 to disable mines. I even received a Navy Cross for my actions. But I grew to realize that loving America means speaking out against — not fighting in — unnecessary wars. We were wrong to be in Iraq then, and we shouldn't be there now. Deception of the American people for political gain is itself a weapon of mass destruction. Because of who I am, where I've been, and what I've seen, I will work to spread this message until I meet my end.

But on the lighter side: I like cooking with eggplant. I've mastered Rachmaninoff's Symphony Number 2 on the piano. President James A. Garfield was my Great-Great-Uncle. And I'm the kind of guy who always finds the penny heads-side up. Are you game?

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF AMES

UNITED STATES OF AMERICA v. OTIS GARFIELD	Docket No. CR 11-512

OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

The United States of America, by Emily Crowl, Assistant United States Attorney for the District of Ames, files this Opposition to Defendant's Motion to Dismiss the Indictment in the above-captioned case.

The Stolen Valor Act, 18 U.S.C. § 704(b), (d), does not violate the First Amendment. Congress deemed the criminal sanctions in the Act necessary in order "to protect the reputation and meaning of military decorations and medals." *Stolen Valor Act of 2005*, Pub. L. No. 109-437, § 2, 120 Stat. 3266, 3266 (2006). Individuals who falsely claim to have received such awards dilute their value. The Government's interest in protecting the integrity of these military honors is beyond dispute, particularly in light of Congress's "necessarily strong" power to legislate in the military context. *United States v. Alvarez*, 638 F.3d 666, 687 (9th Cir. 2011) (Gould, J., dissenting from denial of rehearing en banc).

In arguing that this court should apply strict scrutiny to the Act, the defendant "ignore[s] a straightforward aspect of First Amendment law: the right to lie is not a fundamental right under the Constitution." *Id.* at 678 (O'Scannlain, J., dissenting from denial of rehearing en banc). Thus, for over 40 years the Supreme Court has consistently observed that "erroneous statement[s] of fact [are] not worthy of constitutional protection." *Gertz v. Robert Welch, Inc.*,

418 U.S. 323, 340 (1974); *see also Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless."). Although the Court has in limited contexts "protect[ed] some falsehood in order to protect speech that matters," *Gertz*, 418 U.S. at 341, this protection is the exception rather than the rule. And the rule — that the Free Speech Clause does not shield false statements of fact — governs in this case.

The defendant seeks to avoid the clear import of Supreme Court precedent in this area by suggesting that his lies count as political speech. But as the defendant must know by now, merely saying it does not make it so. The defendant did not make his false claims at a political rally or in a newspaper editorial opposing the war in Iraq. Instead, he stated that he had received a Navy Cross on an online dating website. This falsehood was surrounded by several others concerning the defendant's educational background, feats of athleticism, and volunteer service. In context, it is clear that these misrepresentations served one purpose only: to make the defendant attractive to members of the opposite sex so that they would want to date him. The defendant's self-promotion does not qualify as political speech.

Nor does it matter that the defendant's lies were autobiographical in nature. The Supreme Court has not adopted special First Amendment rules for untrue self-promotion. "If the Stolen Valor Act 'chills' false autobiographical claims" — claims that would otherwise devalue military decorations and medals — "our public discourse will not be the worse for the loss." *United States v. Alvarez*, 617 F.3d 1198, 1233 (9th Cir. 2010) (Bybee, J., dissenting).

The defendant also suggests that a ruling in his favor is necessary to prevent the Government from criminalizing other kinds of lies, including those involving appearance and schooling. But the laws the defendant hypothesizes do not in fact exist. In resolving this as-

applied challenge, this court should confine its analysis to the text and purpose of the Stolen Valor Act.

In short, the defendant's misrepresentation about receiving the Navy Cross is not entitled to First Amendment protection. Accordingly, it is unnecessary to apply strict scrutiny, and the Stolen Valor Act is constitutional as applied in this case.

Wherefore the Government requests that the defendant's motion be denied.

Respectfully Submitted,

By: *Emily Crowl*

Emily Crowl
Assistant United States Attorney

Dated: April 11th, 2011

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE KAREN L. BLACK ON MAY 23, 2011

THE COURT: I assume that both sides are ready to proceed in the matter of United States against Garfield, Number 11-512. Are you ready Ms. Gillihan?

GILLIAN GILLIHAN, Federal Public Defender: Yes, your honor.

THE COURT: And Ms. Crowl?

EMILY CROWL, Assistant U.S. Attorney: The Government is ready, your honor.

THE COURT: Okay. Here's how we'll proceed. The first thing I'm going to do is to get these sentencing guidelines out of the way. I'm happy to say that there is substantial agreement between the parties on that score, with the only dispute being whether the defendant should receive a reduction for acceptance of responsibility. I've read the memorandums filed by both sides and I'm prepared to rule on that issue. But before I do, I'll hear first from the Government regarding sentencing, and then I'll hear from the defense. And of course, Ms. Gillihan, your client, Mr. Garfield, has the right to speak; that is, to say whatever it is he wants to say to help me in determining what the sentence should be. Now, Ms. Crowl, I'll give you a little time to talk about sentencing.

CROWL: Thank you, your honor. The Government of course understands that the defendant's decision to plead guilty is

significant evidence of acceptance of responsibility. But the guidelines say that this evidence can be outweighed by any conduct of the defendant that is inconsistent with acceptance of responsibility. So the two-level adjustment isn't available as a matter of right even to defendants who plead. And here, we think the adjustment is unwarranted because even though the defendant has admitted his conduct, he told the probation officer who prepared the presentence investigation report that he would do it all again. He said he felt no remorse for his actions and that he did not believe that what he did is a crime. We think these statements are sufficiently inconsistent with acceptance of responsibility that the defendant should not get the reduction in offense level.

THE COURT: Okay, and Ms. Gillihan, do you have a presentation you'd like to make?

GILLIHAN: Well, your honor, what I'd like to do is begin by reading a letter that my client prepared that I think may be helpful as you evaluate the sentencing options here. And he wrote this letter unfortunately too late for it to be considered by the probation officer who prepared the presentence report. But here it is — and I'm reading now.

"I am an outspoken person. I appreciate that in some circumstances that trait can be a flaw. But I am proud to be the kind of person who has convictions and who is willing to

speak out about them. Now, I have not always been honest. I have lied about a lot of things in my life. Sometimes I have lied to other people, and sometimes I have lied to myself. Here is the truth: I am not a Navy SEAL. I was not awarded a Navy Cross. I never even served in the military. When I said these things about myself, I knew they were not true. But saying them got people to listen to me. And I wanted them to hear what I had to say: that, while war is an awful thing, unnecessary war is an evil thing. People heard me when I told them that, and I don't regret that one bit. And so here is another truth: I am not sorry for what I did. The true criminal here is the United States government, which fights unnecessary wars and lies to the American people about its motivations. I am proud to spread that message however, wherever, and whenever I can. I hope the court will consider all that when it sentences me, and will understand that I should not be jailed for this message. I respectfully request the court's understanding — and its mercy."

So that's the letter, your honor. And I would just add to that a response to the government's argument that my client doesn't think that what he did is a crime. Of course, your honor has already rejected our First Amendment challenge to this statute. But I think your honor recognizes that the issue is difficult, and that my client's view — that his speech should not be punished as a crime — is not unreasonable. As to

acceptance of responsibility, Mr. Garfield pleaded guilty and has never denied that he lied about his military service and decorations. That should be enough, your honor, to trigger the two-level downward adjustment.

THE COURT: All right, well I appreciate the arguments from both of you. And I think the acceptance-of-responsibility question is an interesting issue, although to some extent it's a distinction without a difference because in looking at the guidelines, the sentencing range is the same with or without the reduction. But in any case, to make a ruling on the objection, the court is going to decline to grant the two-point reduction that would attend a full acceptance of responsibility. All in all, the court is not satisfied that Mr. Garfield has truly accepted responsibility here. He has shown no remorse for his actions, and he has suggested in several contexts that what he did is not a crime. And the letter — the Court believes the letter does not amount to what the guidelines require, that is, that a defendant clearly demonstrate acceptance of responsibility. And so the Court will not grant a two-level reduction on that basis.

The Court finds in this case, therefore, that the offense level — and this is calculated under U.S.S.G. section 2X5.2 — is six. The defendant has a criminal history category of one, which reflects no previous criminal convictions. And so the

guidelines call for an imprisonment range of zero to six months, and a fine range of $500 to $5000.

Now, Ms. Gillihan, is there anything else — before I impose a sentence here — is there anything else you want to say?

GILLIHAN: Your honor, let me just say that, while my client certainly should not have falsely represented that he received the Navy Cross, he did so, as his letter said, with the motivation to spread an anti-war message. His First Amendment interest in spreading that message is significant. And in committing this offense, he didn't hurt or victimize any particular person. As you've just noted, he has no criminal history to count against him for sentencing purposes. For these reasons, it would be appropriate here to impose no term of imprisonment, which would be at the bottom of the guidelines range.

THE COURT: Okay. Ms. Crowl, is there anything you wish to add for the Government?

CROWL: Very briefly, your honor. This was a serious crime. As Congress observed in enacting the Stolen Valor Act, false representations about the receipt of military medals diminish the value of those awards. And the problem of military posers is at near epidemic levels. The FBI receives upwards of 50 tips a month reporting stolen valor claims. Letting the defendant off scot-free, with no jail time, would not reflect the

seriousness of this offense. The defendant made his false claims moreover, as a simple act of self-promotion to pick up women on an Internet dating website. And finally, as detailed in the presentence investigation report, I note that this offense was the latest in a long string of misrepresentations the defendant has made about himself. The government believes that a sentence at the top of the guidelines range is in order.

THE COURT: Very well. I appreciate the arguments on both sides. Mr. Garfield, this is an unpleasant duty for me this morning, but it is one that has to be performed. I do not doubt the sincerity of your opposition to U.S. military policy. But I need to set the record straight. You are not being punished for that message, as your letter suggests. You are being punished for lying about having received one of the highest military honors. That crime does have a victim — the men and women of the military who risk their lives, demonstrate extraordinary heroism, and thereby honestly earn the military decoration that you so blithely claimed as your own. And so in selecting a sentence, I am paying particular attention to the need for the sentence to reflect the seriousness of this offense.

I am also focusing on deterrence. You seem to think that because you want to convey a message, you can take whatever steps you deem necessary to make that message most effective. But what you can't do in the service of your message, Mr.

Garfield, is violate the law. You can't yell "fire" in a crowded theater in order to get a mass of people together outside to listen to what you have to say. And so too, you can't say you received a Navy Cross just so that people will listen to you. Now, you've suggested that you don't regret what you did, and you told the probation officer that you'd do it again. So I need to select a sentence that will deter you from that course.

I'm looking, too, at your history and circumstances. The presentence investigation report mentions several incidents — and I know these didn't result in convictions and so they don't affect your criminal history score — but I think these incidents are worth noting. So I'll note for the record here that you once impersonated an Ames University Campus Police officer and attempted to bust a group of students who were smoking marijuana in a campus park. And you also once tried out for reality television with an application that lied about your age, occupation, and family background — all of which was discovered in a background check after you had been preliminarily cast for the show. You apparently have a habit of pretending to be someone you're not. And that's true in all respects in this case. You not only lied about being a Navy SEAL who had received a Navy Cross, but you also lied about your relationship to President Garfield, and about having been to veterinary

school, climbed Mount Kilimanjaro, and served in the Peace Corps.

So, Mr. Garfield, considering the factors listed in 18 U.S.C. section 3553(a), including the seriousness of the offense, the need for deterrence, and the history and characteristics of the defendant, it is the judgment of the Court that you be imprisoned for a term of three months on the sole count of the Indictment. Also, it's not mandatory, but given your history, I think that you will benefit from supervised release, so I'm imposing six months, with the standard conditions that the probation officer will provide to you. It is further ordered that you should pay a fine in the amount of $500. This sentence appropriately balances all the factors discussed in this courtroom today.

Now is there anything else we need to take up today?

CROWL: No, your honor.

GILLIHAN: No, your honor.

THE COURT: Very well. Mr. Garfield, if you wish to appeal, you have ten days to file notice of that. The public defender's office can assist you, or the clerk of court can file a notice of appeal for you. The defendant is remanded to the custody of the Attorney General to start his sentence.

HEARING ADJOURNED

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF AMES

UNITED STATES OF AMERICA	
v.	Docket No. CR 11-512
OTIS GARFIELD	

JUDGMENT IN A CRIMINAL CASE

The defendant entered a conditional plea of guilty on Count One. The defendant is adjudicated guilty of the following:

COUNTS & CONVICTION

Count	Title & Section	Nature of Offense
1	18 U.S.C. § 704	False Claims About Receipt of Military Decorations or Medals

IMPRISONMENT

The defendant is hereby committed to the United States Bureau of Prisons to be imprisoned for a total term of 3 months.

OTHER TERMS

Following incarceration, the defendant is sentenced to 6 months of supervised release.

The defendant is ordered to pay a $500 fine to the United States.

May 23, 2011
Date of imposition of judgment

Karen L. Black
Signature of Judicial Officer

KAREN L. BLACK
United States District Judge
Name and Title of Judicial Officer

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF AMES

UNITED STATES OF AMERICA	
v.	Docket No. CR 11-512
OTIS GARFIELD	

NOTICE OF APPEAL

Defendant hereby gives notice that he is appealing the judgment entered on May 23, 2011 in the above-captioned matter to the United States Court of Appeals for the Ames Circuit.

Respectfully submitted,

Otis Garfield

By: *Gillian Gillihan*

Gillian Gillihan
Federal Public Defender Service
Ten Ames Square
Ames City, Ames 11111

Dated: May 24, 2011