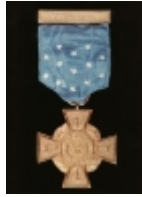




Written by [R. Cort Kirkwood](#) on August 19, 2010

## A Constitutional Right To Lie?

[The Court ruled](#) in the case of Xavier Alvarez, who didn't get caught wearing the medal but simply lied about it. He was tried for violating the federal [Stolen Valor Act](#). A new member of the Three River Valley Water Board in California in 2007, he made the following claims in his introductory remarks: "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." As the *New York Times* [put it](#), "only the last three words were true."



Apparently, Alvarez is a bit of a nut case. He has claimed to be a member of the Detroit Red Wings, [the Times reported](#), and to have rescued the American ambassador to Iran during [the hostage crisis](#) during the Carter Administration.

[Reported the Times](#): "There's no question he's pathological," said Bob G. Kuhn, the board's president, recounting some of what has come out of Mr. Alvarez's mouth. "He's had three helicopter accidents. He's been shot 16 times. These are all fabrications."

But Mr. Kuhn said the board was powerless to expel Mr. Alvarez, who continues to receive \$200 per meeting and health insurance. The board has censured him, though, for putting a woman he falsely claimed was his wife on the board's health plan.

Alvarez faced two years in prison and a \$200,000 fine for telling the ultimate lie: that he wore the nation's highest military decoration and belonged to the storied ranks of Audie Murphy, Alvin York and Rocky Versace.

### Lying Doesn't Matter

But alas, the Ninth Circuit, in all its majesty, doesn't think lying about something this important matters. That is because if lying about wearing military decorations is a crime, and Mr. Alvarez can't lie about earning the Medal of Honor, then no one could lie about anything without getting in trouble. In short, the court ruled, the First Amendment creates a constitutionally protected right to lie. [Explained Judge Milan D. Smith](#):

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. The sad fact is, most people lie about some aspects of their lives from time to time....

Actually, a lot of people don't lie about their lives from time to time, but in any event this is the second blow the Stolen Valor Act has taken on First Amendment grounds. In July, [a U.S. District judge dismissed](#) a similar case against [Rick Strandlof](#), a phony who lied about being a veteran of the Iraq war and made quite a name for himself under the phony *nom de guerre*, Rick Duncan. A central premise of



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the Stolen Valor Act is that lying about military service, particularly holding battle decorations, dishonors the service of real veterans. [Wrote Judge Robert E. Blackburn:](#)

This wholly unsubstantiated assertion is, frankly, shocking and, indeed, unintentionally insulting to the profound sacrifices of military personnel the Stolen Valor Act purports to honor, Blackburn wrote. To suggest that the battlefield heroism of our servicemen and women is motivated in any way, let alone in a compelling way, by considerations of whether a medal may be awarded simply defies my comprehension.

Rep. [John T. Salazar](#), D-Colo., who introduced the bill in Congress In 2005, thinks his law is safe. [He told](#) the *Times*:

I am confident that upon appeal to the Supreme Court their misguided decision will be overturned. We live in a society that wants to honor our nation's veterans. As long as I am in Congress, I will not give up the effort to protect their honor. These fake heroes use lies to claim undeserved federal veterans benefits and defraud their communities into believing they are someone they are most certainly not for personal gain.

The main argument from these two courts is that lying permissible under the Constitution. Maybe, maybe not.

### **No Lies About Committing Crimes**

It certainly isn't permissible to lie if you are under investigation for a crime, as Illinois Gov. Rod Blagojevich found out early this week. Although a federal jury found him guilty of only one of 24 counts in his high-profile corruption trial, the one county on which he was found guilty was lying to federal authorities. As [The American Spectator reported](#):

Governor Blagojevich was convicted of making false statements to federal agents. He told the FBI that he did not track campaign contributions and kept a "firewall" between his campaign and his official duties as Governor. In other words, federal agents asked him if he broke the law — and just like any child who is caught with his hand in the cookie jar — he said "no."

Until 1998, the *Spectator's* [Russ Ferguson reported](#), courts permitted defendants to utter an "exculpatory no."

This "exculpatory no" doctrine was not put into the false statements statute by Congress. It wasn't even in the legislative history. Congress never even considered it. Judges decided to create it because of the basic human instinct to deny, deny, deny.

But Associate Justice Antonin Scalia, in the case of [Brogan v. United States](#), put an end to the alleged constitutional right of criminals to lie to authorities. In that one, a criminal defendant lied about crimes committed while he was a union official.

Federal agents visited a union officer at his home. "Have you ever received any cash or gifts from the company while you were a union officer?" they asked him. Naturally, he said "no."

Later, they found out he had in fact received improper benefits. So he was convicted for making false statements to federal agents and appealed to the Supreme Court — after all, plenty of people were telling this very same lie and walking away under the "exculpatory no" doctrine.

Brogan argued that a defendant had to be excused for his denial to federal agents because the spirit of the Fifth Amendment would be violated when someone is "cornered" and given a "cruel



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trilemma”: tell the truth (and admit guilt), remain silent, or lie (and falsely deny guilt).

Scalia snapped back, saying lying is not an option. An innocent person, after all, would not face the same trilemma. The innocent person only has two options: tell the truth or remain silent.

“Whether or not the predicament of the wrongdoer run to ground tugs at the heartstrings, neither the text nor the spirit of the Fifth Amendment confers a privilege to lie,” Scalia wrote. The Fifth Amendment gives the alleged criminal the right to remain silent, but not to lie.

The cases, of course, are different. In the Medal of Honor cases, the defendants broke a federal law that prohibits lying about military service. In the Brogan case, the defendant lied to police about committing a crime. The first involves the [First Amendment](#) to the [Constitution](#); the second, obviously, the [Fifth](#), which protects a defendant from incriminating himself. Both, however, involve the Constitution.

Question is, does it protect “the right to lie,” as the Ninth Circuit says it does.



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