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GOVERNMENT

The Stolen Valor Act: Is policing honesty the best policy?

By Andrew J. Thomas

Do you have a First Amendment right to tell lies about yourself? Should you have that right? Should the government be able to criminalize statements made in the heat of political debate — about a candidate's qualifications, a rival's voting record, the effect of a tax plan, global warming — on the ground that they are false?

The U.S. Supreme Court will confront such questions this term in a case that arose in the 9th U.S. Circuit Court of Appeals, *United States v. Alvarez*, concerning the Stolen Valor Act.

The Act makes it a federal crime, punishable by fines and up to a year in prison, for a person falsely to claim to have "been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." See 18 U.S.C. Section 704(b). The Act was passed by the Senate on unanimous consent and sailed through the House of Representatives on a voice vote, becoming law in 2006.

In 2007, Xavier Alvarez, a member of a municipal water district board in Claremont, violated the statute in flamboyant fashion during a speech to a neighboring water board. Introducing himself, Alvarez claimed that he was a "retired marine of 25 years," that he "got wounded many times by the same guy," and that he was awarded the Congressional Medal of Honor in 1987. None of this was true.

A divided 9th Circuit panel reversed Alvarez's conviction and struck down the Act. Writing for the majority, Judge Milan Smith noted that the Act "concerns us because of its potential for setting a precedent whereby the government may proscribe speech solely because it is a lie." The majority found the Act to be a content-based speech restriction, applied strict scrutiny, and held it was unconstitutional on its face and as applied. Judge Jay Bybee dissented, urging that all false statements of fact should be treated as categorically undeserving of First Amendment protection, unless protection is shown to be necessary to allow "breathing space" for other "speech that matters."

The government sought rehearing en banc, which the 9th Circuit narrowly denied. Seven judges dissented, echoing Judge Bybee's views. In a separate opinion concurring in the denial of review, Chief Judge Alex Kozinski noted that lies about oneself are commonplace in day-to-day life. A First Amendment rule that categorically made all false statements of fact subject to criminal prosecution would be "terrifying," in Judge Kozinski's view, because it would permit censorship by the "truth police" of the "white lies, exaggerations and deceptions that are an integral part of human intercourse." The Supreme Court granted certiorari in October 2011.

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At stake may be no less than the question of who gets to decide political "truth." The Supreme Court's decision in Alvarez undoubtedly will inform pending challenges to Ohio's election law, for example. That law authorizes the government to fine or imprison any candidate who makes a false statement about the voting record of a public official or who knowingly or recklessly "disseminate[s] a false statement concerning a candidate" with the intent to influence an election.

For at least the past half century, the Supreme Court generally has avoided weighing the value of particular speech against other societal interests on an [ad hoc], case-by-case basis. Outside the context of advertising, the Court instead has applied strict scrutiny to governmental regulations that are based on the content of speech. To satisfy strict scrutiny, a content-based regulation must be narrowly tailored to achieve a compelling governmental interest.

At the same time, the Court has recognized that certain "well-defined and narrowly limited classes" of speech historically were considered to be so lacking in social value that they do not merit First Amendment protection at all. These categories include obscenity, incitement, fraud, and "fighting words."

Beyond these unprotected categories, the Court's application of strict scrutiny to content-based speech regulations has almost always resulted in the invalidation of the restriction. As Stanford Law School Professor Gerald Gunther famously remarked in describing the review of racial classifications, the Court's scrutiny has been "strict in theory, but fatal in fact."

Alvarez presents the Supreme Court with some sticky choices. It seems unlikely the Court will embark on an *ad hoc* balancing of the costs and benefits of false speech about military decorations, or that it will announce a new category of unprotected speech encompassing all false statements of fact.

Over the past two terms, the Court emphatically has rejected attempts to add to the number of categories of speech that get no First Amendment protection — in *United States v. Stevens* (2010) (concerning animal cruelty depictions) and *Brown v. Entertainment Merchants Association*

(2011) (concerning violent videogames). In Stevens, the Court cautioned that its prior decisions finding certain categories of speech unprotected "cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."

Although the Court has stated repeatedly — including in *Gertz v. Robert Welch Inc.* (1974) — that "there is no constitutional value in false statements of fact," these statements most often have been made while considering defamation claims. The Court has never squarely held that *all* false speech is undeserving of First Amendment protection.

The Court has included libel among the classes of speech that traditionally get no constitutional protection, but defamation by definition is false speech that causes harm to the reputation of another person. Similarly, the Court has recognized that the First Amendment does not protect fraud. But fraud also by definition is false speech that causes bona fide harm to another — inducing the victim to rely to his or her detriment on false statements of material fact.

The false speech targeted by the Stolen Valor Act does not fit this rubric: False claims of wartime valor do not directly harm any particular person. Indeed, the greatest injury from violations of the Act would appear to be to the liars themselves, once they are exposed and publicly scorned.

Arguably, a politician's false boasting about a military decoration — like Alvarez's extravagant fabrications in the water district meeting — harms the political process by subjecting the voting public to misinformation. But political debate is an area where the Supreme Court has long recognized that the solution to inaccurate speech is *more* speech — "counter-speech" by political adversaries who can expose their opponents' lies and set the record straight.

If the Supreme Court applies strict scrutiny to the Stolen Valor Act, it seems likely that the statute will be invalidated. Even if the government's asserted interest in "safeguarding" the "integrity" of the military honors system and "fostering morale" is deemed compelling, it is hard to see how criminalizing false boasting like Alvarez's is narrowly tailored to achieve that purpose. Alvarez's tall tale did not "steal" any hero's valor or cause the armed forces any reputational damage. The public does not lose respect for the Purple Heart because some people falsely claim to have received one.

The Stolen Valor Act itself seems unlikely to chill much speech or lead to self-censorship. After all, a speaker should be able to tell quite easily whether he or she is lying about having received the Medal of Honor. But similar laws aimed at policing the line between truth and falsity in political campaigns — like the Ohio election statute — raise obvious and serious dangers that a candidate will mute his criticism of an opponent out of fear that he will be criminally prosecuted after the election if the district attorney happens to belong to his opponent's political party (and happens to hold grudges). Political speech is likely to be more robust if, in the case of the Stolen Valor Act, the Court's scrutiny once again proves to be strict in theory and fatal in fact.

The Supreme Court nevertheless may wish to leave the door open to finding that some types of false statements of fact — those that cause demonstrable harm to others and are not readily remedied by countervailing speech — are beyond the scope of First Amendment protection.

Free speech advocates may find this result preferable to a precedent requiring that every federal and state law (and there are many) that prohibits false factual statements must withstand strict scrutiny. A series of rulings applying strict scrutiny only to *uphold* the challenged statutes may in the long run dilute the rigor of that heightened standard of review when it is invoked as to other content-based speech restrictions.

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