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Constitutional Law—Freedom of Speech

Splintered Supreme Court Shoots Down Stolen Valor Act Under First Amendment

Lies about having received military awards may be speech protected by the First Amendment, the U.S. Supreme Court held June 28 (*United States v. Alvarez*, U.S., No. 11-210, 6/28/12).

Without agreeing on the reasoning, six justices decided that the Stolen Valor Act, which criminalizes lying about receiving a military medal, violates the First Amendment rights of the liar.

Justice Anthony M. Kennedy, joined by Chief Justice John G. Roberts Jr. and Justices Ruth Bader Ginsburg and Sonia Sotomayor, applied strict scrutiny to the statute. Justice Stephen G. Breyer, joined by Justice Elena Kagan, concurred in the judgment but applied intermediate scrutiny and suggested that the statute can be rewritten to avoid its constitutional problems.

Justice Samuel A. Alito Jr., joined by Justices Antonin Scalia and Clarence Thomas, argued that lies simply are not protected speech under the First Amendment.

While several First Amendment attorneys suggested to BNA that the opinion's impact on First Amendment jurisprudence will generally be limited, one attorney envisioned its application to cases where courts are asked to remove defamatory posts from Internet blogs.

Lie About Congressional Medal of Honor. Xavier Alvarez lied when he told a local water district board that he won the Congressional Medal of Honor. As a result of the lie, he was prosecuted under the SVA, 18 U.S.C. § 704(b), which 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.

Alvarez pleaded guilty, but challenged the constitutionality of the SVA. The district court said that the statute is constitutional, but the Ninth Circuit reversed. After the Supreme Court granted certiorari in this case, the Tenth Circuit handed down its opinion in *United States v. Strandlof*, 667 F.3d 1146, 80 U.S.L.W. 1003 (2012), which found the statute constitutional.

No New Category. Alvarez challenged the SVA as a content-based suppression of pure speech that does not fall within any of the few categories of expression where content-based regulation is permissible.

According to Kennedy, ''When content-based speech regulation is in question . . . exacting scrutiny is required.'' He added that content-based restrictions on speech are permitted for only a limited number of categories of expression, such as speech likely ''to incite imminent lawless action.''

Kennedy pointed out that absent from the list of categories ''where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.'' Moreover, he said that ''some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.''

The government argued that false statements have no value and are therefore not protected by the First Amendment, but Kennedy said that the cases cited for that proposition discussed ''defamation, fraud, or some other legally cognizable harm associated with a false statement.'' He said:

> The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.

The government gave the court three examples of regulations on false speech that are generally permissible—the criminal prohibition of a false statement made to a government official, laws punishing perjury, and the false representation that the speaker is speaking as a agent of the government. Kennedy said, however, that these restrictions ''do not establish a principle that all proscriptions of false statements are exempt from exacting First Amendment scrutiny.''

Distrust of Content-Based Restrictions. According to Kennedy, ''The probable, and adverse, effect of the Act on freedom of expression illustrates, in a fundamental way, the reasons for the Law's distrust of content-based speech prohibitions.''

The SVA, by its own terms, applies to false statements ''made at any time, in any place, to any person,'' Kennedy said. Even assuming it would not be applied to theatrical performances, ''the sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment,'' he said. ''Were this law to be sustained, there could be an endless list of subjects the Na-

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tional Government or the States could single out'' for speech regulation, he said.

According to Kennedy, ''Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition.'' He added, ''The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.''

Significant Objectives Insufficient. Kennedy noted that the objectives the statute is designed to protect ''are not without significance.'' Even so, he said ''the Act does not satisfy exacting scrutiny.''

Military medals promote the important public function of recognizing the recipients for acts of heroism and sacrifice, Kennedy said. Moreover, the government's ''interest in protecting the integrity of the Medal of Honor is beyond question.'' But the First Amendment requires that the government's chosen restriction on speech be actually necessary to achieve that interest. ''There must be a direct causal link between the restriction imposed and the injury prevented,'' he said.

The government did not show a link between protecting military honors and the statute's ''restriction on the false claims of liars like respondent,'' Kennedy said. He added, ''The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest.''

Furthermore, ''The remedy for speech that is false is speech that is true,'' Kennedy said. He also said, ''Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.''

To protect the integrity of Medal of Honor winners in the future, Kennedy suggested that the government create a database accessible to the public that lists all the medal winners. Such a database will make it easy to verify false claims and expose the people making those claims to public censure, he said.

Intermediate Scrutiny. Breyer's opinion eschewed strict scrutiny of the law, opting to apply intermediate scrutiny instead. Although the concurrence reached the same conclusion as Kennedy's plurality opinion, Breyer based his decision ''upon the fact that the statute works First Amendment harm, while the Government can achieve its legitimate objectives in less restrictive ways.''

Breyer read the statute ''favorably to the Government as criminalizing only false factual statements made with knowledge of their falsity and with the intent that they be taken as true.'' The statute therefore ''covers only lies,'' he said.

Breyer acknowledged that Supreme Court precedent ''frequently said or implied that false factual statements enjoy little First Amendment protection.'' He added, however, that these ''judicial statements cannot be read to mean 'no protection at all.' ''

Breyer noted that while criminalizing false statements can chill speech, many statutes and common law doctrines ''make the utterance of certain kinds of false statements unlawful.'' But, ''few statutes, if any, simply prohibit without limitation the telling of a lie, even a lie about on particular matter,'' he said.

Instead, Breyer said that most of those laws require ''limitations of context,'' and ''proof of injury'' to narrow their reach. ''The limitations help to make certain that the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small.''

The SVA ''lacks any such limiting features,'' Breyer said. Even read to apply only to lies, the statute ''ranges very broadly,'' he said. That breadth ''means that it creates a significant risk of First Amendment harm,'' he said. Because it can reach family and social settings, he said ''that the statute as written risks significant First Amendment harm.''

Nevertheless, Breyer said the statute has ''substantial justification,'' and can be rewritten to eliminate its First Amendment infirmities. A new, finely tailored statute ''might . . . insist upon a showing that the false statement caused specific harm or at least was material, or focus its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm,'' he said.

'Bravest of the Brave.' Alito's dissent said, ''Only the bravest of the brave are awarded the Congressional Medal of Honor, but the Court today holds that every American has a constitutional right to claim to have received this singular honor.''

According to Alito, the SVA is ''a narrow statute that presents no threat to the freedom of speech.'' He said that it ''reaches only knowingly false statements about hard facts directly within a speaker's personal knowledge.'' Moreover, ''These lies have no value in and of themselves, and proscribing them does not chill any valuable speech,'' he said.

By holding that the First Amendment shields these lies, ''the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest,'' Alito said.

First Amendment Rights Vindicated. Robert Corn-Revere, Davis Wright Tremaine LLP, Washington, D.C., who submitted an amicus brief supporting Alvarez on behalf of the Reporters Committee for Freedom of the Press and others, told BNA June 28 that the opinion continues the Supreme Court's trend of vindicating First Amendment rights even when the speech is hateful or deemed to have low value. He added that the opinion does not really break any new ground because the plurality did not create a new category of unprotected speech.

Meanwhile, Kevin N. Ainsworth, Mintz Levin Cohn Ferris Glovsky and Popeo PC, New York, who submitted a brief on behalf of the Congressional Medal of Honor Foundation supporting the government, told BNA June 28 that the opinion is ''a clear, unequivocal expression by the court that lies are protected by the First Amendment. Until now, the court's jurisprudence indicated that lies were unprotected speech.''

Ainsworth also said that the opinion ''will not have a big impact on First Amendment jurisprudence because the issue was very narrow.'' He said, ''As Justice Kennedy pointed out, the court's prior decisions have not addressed a statute 'that targets falsity and nothing more.' . . . Yet, [Kennedy's] statement that 'The remedy

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for speech that is false is speech that is true' undoubtedly will be raised [in] any case where a court is asked to order the removal of defamatory posts from an Internet blog.''

Ainsworth added that the opinion should not have ''an impact on the First Amendment jurisprudence in the context of commercial speech, since false claims in the commercial context have long been prohibited.''

What's the Test? Professor John M. Greabe, University of New Hampshire School of Law, who submitted an amicus brief not supporting either party in the case, told BNA June 28 that the interesting question presented by the opinion concerns the default position of the three opinions with respect to speech.

Greabe explained that for Kennedy, if the speech regulation is content-based, strict scrutiny will be applied unless the speech fits into one of the previously carved out categories of speech. Breyer, on the other hand, does not want to ''precommit'' to what is protected, and adopted more of a sliding scale to look at the speech involved, Greabe said. Alito, meanwhile, insists that the speech have some value before the First Amendment applies, he said.

According to Ainsworth, the starting point in the test set out by the opinion to determine whether a lie is protected by the First Amendment ''is to assume that all lies are protected—to some degree—by the First Amendment.'' He said that the court held ''that the First Amendment protects 'an intended, undoubted lie' concerning 'easily verifiable facts.' '' He also noted, however, that ''as Justice Breyer offered in his concurring opinion, a lie can be proscribed if it 'caused specific harm or at least was material' or the statute 'focus[es] its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm.' ''

Corn-Revere said that the test for protecting false statements in the future will come from Breyer's opinion because it is narrower.

Not Over Yet? As a result of this opinion, a ''statute of limited scope would survive constitutional scrutiny, and efforts are underway to enact a revised statute,'' Ainsworth said. He noted, ''Justice Breyer suggested giving greater protection for some medals than others, but offered no guidance on where to draw the line. [Breyer] suggested that the Stolen Valor Act would survive if it required a showing of specific harm caused by the lie; but the Court rejected the evidence of harm and dilution that the Government offered. So what degree of harm is required? These and other questions will be sorted out when drafting a new Stolen Valor Act.''

Scalia and Thomas are usually ardent supporters of the First Amendment, and Greabe found it ''striking'' that they found the SVA constitutional. He explained that they ''are not dismissive of First Amendment concerns,'' or the arbitrary exercise of government power.

Corn-Revere suggested, however, that the subject matter of the SVA had an impact on how the three dissenters voted.

Summing up, J. Joshua Wheeler, the Thomas Jefferson Center for the Protection of Free Expression, Charlottesville, Va., which also submitted an amicus brief in the case supporting Alvarez, told BNA June 28, ''I have yet to meet anyone who condones lying about military honors, but this case is about far more than that.''

''The larger issue is whether the government should have the authority to determine the truthfulness of speech and criminalize any statement that fails to meet the government's standard. Justice Kennedy got it exactly right that in a free society '[t]he remedy for speech that is false is speech that is true,' '' he said.

Solicitor General Donald B. Verrilli Jr. argued for the government. Los Angeles Deputy Public Defender Jonathan D. Libby argued for Alvarez.

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