

## **LAW REVIEW**

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### **THE FIRST AMENDMENT STRIKES AGAIN**

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The First Amendment states in part: "Congress shall make no law...abridging the freedom of speech..."

Let me get right out there: sometimes the First Amendment is overused and abused. All of you First Amendmentsers fire away.

#### **I Won the Congressional Medal of Honor**

Xavier Alvarez won a seat on a local water board. As part of his campaign he introduced himself, stating "I'm a retired marine of 25 years. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around."

Alvarez has never been awarded the Congressional Medal of Honor, nor has he spent a single day in any of our armed forces. Everything he said except "I'm still around" was a lie.

Actually, those weren't the only lies coming from our friend Alvarez. He once told a woman that he rescued the American Ambassador during the Iranian hostage crisis and that he had been shot in the back as he returned to the Embassy to save the American flag. He told another woman that he was a Vietnam veteran helicopter pilot who had been shot down. He once claimed to

have played hockey for the Detroit Red Wings and to have been secretly married to a Mexican starlet.

I'd say Alvarez has a little problem.

#### Stolen Valor Act

Alvarez was charged and conditionally pled guilty to the Stolen Valor Act adopted by Congress in 2005. He appealed his conviction.

I like the Stolen Valor Act: "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."

I don't know about you, but the Act seems pretty clear. If you lie about your military medals, it's a crime.

Oh that's right, the First Amendment protects free speech and Alvarez had a right to lie about himself. Or did he?

#### First Amendment

As one court wrote, "The constitutional right of free expression is powerful medicine in a society as diverse and populace as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us...We cannot lose sight of the fact that, in what otherwise might seem

a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.”

### Majority Ruling

A two-judge majority of the U.S. Court of Appeals in the 9<sup>th</sup> Circuit noted that the Stolen Valor Act regulates words so is “content-based” regulation of speech, which is ordinarily subject to “strict scrutiny” by the courts, largely disfavored.

While limitations on the content of speech are generally prohibited by the courts, restrictions are generally allowed in a few categories which include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.

The majority found Alvarez’s blatant lies did not fit within any of the free speech exceptions, so he was acquitted—allowed to continue bragging about his past military achievements.

I disagree with the majority, but somewhat agree with their comment, “it is speculative at best to conclude that criminally-punishing lies about having received Congressionally-awarded medals is the best and the only way to ensure the integrity of such medals...”

### Dissent

Dissenting Judge Bybee disagreed with the majority’s conclusion that the Stolen Valor act was unconstitutional because it did not require that Alvarez intentionally and knowingly lie, i.e., perhaps he was mistaken. Right.

Bybee also took the majority to task for concluding that as written the Act could be used against Jon Stewart in “The Daily Show” and Stephen Colbert in

“The Colbert Report”. He noted for example that it would not be unusual for Stephen Colbert to claim he won the Congressional Medal of Honor just as Tom Hanks did when portraying Forrest Gump. Bybee wrote, “I do not believe it realistic that anyone would think to accuse Colbert or Hanks of violating the Stolen Valor Act in these contexts. Assuming, as I must, that the Act will be applied with some modicum of common sense, it does not reach satire or imaginative expression.”

Alvarez, who was the first (and last) person charged and convicted under the Stolen Valor Act, got the Act ruled an unconstitutional violation of his free speech.

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