



# OLR RESEARCH REPORT

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## SUMMARY OF UNITED STATES V. ALVAREZ

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You asked for a summary of the U.S. Supreme Court's decision in *United States v. Alvarez* (567 U.S.\_\_\_\_\_(2012)).

### SUMMARY

On June 28 2012, a divided U.S. Supreme Court, in *United States v. Alvarez*, struck down as unconstitutional a federal law that criminalizes lying about being awarded military decorations or medals and imposes an enhanced penalty for lies involving a Congressional Medal of Honor. The case involved a California man, Xavier Alvarez, whose conviction for lying about being awarded the Congressional Medal of Honor was overturned on appeal.

Applying the "strict scrutiny" standard of judicial review, a plurality of the justices said the law, known as the Stolen Valor Act, was written so broadly that it infringed on free speech protected by the First Amendment and threatened to do more harm than good. Writing for the plurality, Justice Anthony Kennedy said the First Amendment protects speech we detest as well as speech we embrace, and while it does not protect all lying, it protects lies like the ones Alvarez told. In essence, the Court said lying about receiving military honors is contemptible but constitutional.

Kennedy's plurality opinion was signed by Chief Justice John Roberts and Justices Ruth Bader Ginsburg and Sonia Sotomayor. A concurring opinion by Justice Stephen Breyer was joined by Justice Elena Kagan. Applying the "intermediate standard" of scrutiny, Justice Breyer said the government had a legitimate interest in suppressing lies about receiving military medals but could do so in less restrictive ways. He suggested that a narrower version of the law might be constitutional in that it "could significantly reduce the threat of First Amendment harm while permitting the statute to achieve its important protective objective" (*id.*, at p.1).

Justices Samuel Alito, Antonin Scalia, and Clarence Thomas dissented, arguing that the law does not threaten free speech, but rather punishes lies that could undermine the system of military honors and inflict real harm on actual medal recipients and their families.

## **FACTS**

The federal Stolen Valor Act makes it a crime to lie about having been awarded military medals or decorations. A violation is a misdemeanor, punishable by up to one year imprisonment, with an enhanced penalty of up to three years imprisonment for claims involving the Congressional Medal of Honor ([18 USC § 704\(b\) and \(c\)](#)).

Alvarez was charged with violating the law by falsely claiming he had been awarded the Congressional Medal of Honor. He moved to dismiss the charge, claiming that the law was unconstitutional in that it criminalized speech protected by the First Amendment. He was convicted and sentenced to three years probation and 416 hours of community service and required to pay a \$5,000 fine and a \$100 special assessment.

## ***Procedural History***

On appeal, a three-judge panel of the Ninth Circuit Court of Appeals, by a two to one vote, reversed Alvarez's conviction holding the law unconstitutional ([617 F. 3d 1198](#)). The Appeals Court rejected the government's argument that false statements are not constitutionally protected. Writing for the majority, Judge Milan Smith said that if the law was deemed constitutional:

[t]here 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 government cannot decide that some lies may not be told without a reviewing court's undertaking a thoughtful analysis of the constitutional concerns raised by such government interference with speech (*id.*, at p. 3).

When the Appeals Court denied the government's request for a rehearing by the full court, the government appealed the ruling and the Supreme Court agreed to hear the case and consider whether the Stolen Valor Act is unconstitutional. (After the Supreme Court agreed to hear the case, the Tenth Circuit Court of Appeals, in an unrelated case, also in a divided opinion, found the law constitutional (667 F.3d, 1146 (2012)). This created a conflict in the Courts of Appeals on the law's validity.)

## **SUPREME COURT**

The question before the Supreme Court was whether the First Amendment protects lies about receiving military awards (567 U.S.\_\_\_\_(2012)). Alvarez argued that the Stolen Valor Act suppressed speech falling outside the few categories of expression where such suppression is permissible. The government defended the law as necessary to preserve the medal's integrity and purpose and contended that false statements have First Amendment protection "only to the extent needed to avoid chilling fully protected speech" (*id.*, at p. 4).

On June 28, 2012, the Supreme Court, in a six to three decision, found the law unconstitutional. Justice Kennedy wrote the opinion for a plurality of the Court. He was joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor. Justices Breyer and Kagan concurred. Justices Alito, Scalia, and Thomas dissented.

### ***Plurality Opinion***

Justice Kennedy's plurality opinion concluded that the Stolen Valor Act seeks to restrict speech based on its content. Generally, it is unconstitutional to restrict speech based on its message, ideas, subject, or content. Because the law sought to restrict content, the opinion concluded that it had to be analyzed under the "strict scrutiny" standard, which is the most rigorous First Amendment standard. To survive this standard, the government must show that the law is narrowly tailored and is the least restrictive means of meeting a compelling government need.

After conducting an extensive historical review of First Amendment cases, the plurality concluded that historically, content-based restrictions on speech have been permitted only for a few categories of

speech, such as incitement, obscenity, defamation, child pornography, fraud, true threats, and speech integral to criminal conduct. There is no “general exception to the First Amendment for false statements,” Justice Kennedy wrote (*id.*, at p. 5). He acknowledged that many laws punish or criminalize false statements, but they traditionally criminalize false statements that cause some definite and identifiable harm. This was not the case with the Stolen Valor Act. According to the plurality, “for all the record shows, respondent’s statements were but a pathetic attempt to gain respect that eluded him. . . . The statements do not seem to have been made to secure employment or financial benefits or privileges reserved for actual recipients of the medal” (pp. 1, 2). In this regard, the case was different from prior First Amendment cases on false statements in that it “targets falsity and nothing more” (*id.*, at p. 7).

Justice Kennedy said that false statements are not, solely because they are false, excluded from First Amendment protection. He said that the law, as written, would criminalize any false speech, even “personal, whispered conversations within a home” and this was granting the government too much power.

The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain. . . . Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principal (*id.*, at pp. 10, 11).

Justice Kennedy acknowledged the government’s interest in protecting the integrity of the Medal of Honor. But he said the First Amendment requires a showing of a direct causal link between the restriction imposed and the injury to be prevented, and the government had produced no evidence to show that criminalizing false claims such as those made by Alvarez was necessary to protect the public’s esteem for military honors (*id.*, at p. 13). And the government could not show why “counterspeech,” such as the ridicule Alvarez received online and in the press, would not suffice to achieve its interest. “The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation can overcome the lie” wrote Justice Kennedy (*id.*, at p. 15). “Indeed, the outrage and contempt expressed for respondent’s lies can serve to reawaken and reinforce the public’s respect for the Medal, its recipients,

and its high purpose (*id.*, at p. 15). The plurality concluded that if the Stolen Valor Act was upheld, it would “give government broad censorial power unprecedented in the Court’s cases or in our constitutional tradition” (*id.*, at p. 11).

Justice Kennedy also said that when the government seeks to regulate protected speech, it must use the “the least restrictive means among available, effective alternatives” (*id.*, at p. 17). He said the government could likely protect the integrity of the military awards system by creating a database of medal winners accessible and searchable on the Internet (*id.*, at p. 17).

### **Concurring Opinion**

In a concurring opinion, Justice Breyer, joined by Justice Kagan, contended that intermediate, not strict, scrutiny was the appropriate standard of review because the government should be able to regulate false statements of fact. Citing precedents, the opinion noted that:

[in] determining whether a statute violates the First Amendment, the Court has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision’s countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other less restrictive ways of doing so. Ultimately the Court has to determine whether the statute works speech-related harm that is out of proportion to its justifications. Sometimes the Court has referred to this approach as “intermediate scrutiny” . . . (*id.*, at p. 1).

To pass intermediate scrutiny, which is a lower standard than strict scrutiny, a law must be substantially related to serving an important government interest. The opinion noted that the statute has “substantial justification” in that “it seeks to protect the interests of those who have sacrificed their health and life for their country” . . . “and serves this interest by seeking to preserve intact the country’s recognition of that sacrifice in the form of military honors” (*id.*, at p. 8). But the justices concluded that the statute, as drafted, was overly broad, creating too significant a burden on protected speech. As such it failed to pass “intermediate scrutiny,” and was thus unconstitutional. According to Justice Breyer:

As written, [the act] applies in family, social, or other private contexts, where lies will often cause little harm. It also applies in political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high. Further, given the potential haziness of individual memory along with the large number of military awards covered (ranging from medals for rifle marksmanship to the Congressional Medal of Honor), there remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to render him liable. And so the prohibition may be applied where it should not be applied, for example, to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like (*id.*, at p. 8).

Justice Breyer concluded that the statute failed intermediate scrutiny and was unconstitutional because it “works First Amendment harm” (*id.*, at p. 10). He said the government could achieve its legitimate objectives in “less restrictive ways,” such as “a more finely tailored statute,” which “could significantly reduce the threat of First Amendment harm while permitting the statute to achieve its important protective objective” (*id.*, at p. 10). The less restrictive ways Justice Breyer mentioned included (1) providing more accurate information on medals to counteract lies, (2) narrowing the law’s scope to situations that pose or cause actual harm, and (3) narrowing the law to cover a shorter list of medals.

### ***Dissenting Opinion***

Justice Alito, joined by Justices Scalia and Thomas, dissented. While recognizing that false statements may be protected when laws restricting them might chill otherwise protected speech, in Alito’s opinion, “lies about military awards have no value in and of themselves, and proscribing them does not chill valuable speech” (*id.*, at p.1).

In voting to uphold the law, Justice Alito focused on the “real harm” caused by lies about military honors. He wrote:

As Congress recognized, the lies proscribed by the Stolen Valor Act inflict substantial harm. In many instances, the harm is tangible in nature: Individuals often falsely represent themselves as award recipients in order to obtain financial or other material rewards, such as

lucrative contracts and government benefits. An investigation of false claims in a single region of the United States, for example, revealed that men had defrauded the Department of Veterans Affairs out of more than \$1.4 million in veteran's benefits. In other cases, the harm is less tangible, but nonetheless significant. The lies proscribed by the Stolen Valor Act tend to debase the distinctive honor of military awards. And legitimate award recipients and their families have expressed the harm they endure when an imposter takes credit for heroic actions that he never performed (*id.*, at p. 5).

According to Justice Alito:

By holding that the First Amendment nevertheless 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. I would adhere to that principle and would thus uphold the constitutionality of this valuable law (*id.*, at p. 1).

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