

Supreme Court Strikes Down Stolen Valor Act

By Captain Samuel F. Wright, JAGC, USN (Ret.)² & Rachel M. Kelly³

10.2—Other Supreme Court Cases

United States v. Alvarez, 132 S.Ct. 2537, 567 U.S. ____ (2012).

On June 28, 2012, the Supreme Court affirmed the United States Court of Appeals for the Ninth Circuit and held that the Stolen Valor Act is unconstitutional under the First Amendment of the United States Constitution (free speech).

For decades, it has been unlawful to wear a Medal of Honor (MOH) or other military decoration that one has not earned. The Stolen Valor Act of 2005 (SVA) expanded the prohibition to include any untruthful claim to have received such a decoration. Title 18, United States Code, section 704(b) provides: “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 ... shall be fined under this title, imprisoned not more than six months, or both.” 18

¹I invite the reader’s attention to <https://www.roa.org/page/LawCenter>. You will find more than 2000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

³Rachel M. Kelly is a second-year law student at William & Mary University in Williamsburg, VA. She spent the summer of 2012 as the summer associate at the SMLC. She is married to LT Justin Kelly, USN, and both of them are ROA members.

U.S.C. 704(b). Under section 704(c), the authorized period of imprisonment is increased to one year if the false claim relates to having received the MOH, our nation's highest military honor.

In 2007, Xavier Alvarez was elected to a seat on the Three Valley Water District Board in California. After winning the campaign, while introducing himself at a board meeting, he claimed that he had served in the Marine Corps for 25 years and that he had been awarded the Medal of Honor. In fact, Alvarez had never served in any branch of the armed forces. Incidentally, he had a habit of lying about his history. He also claimed to have played hockey for the Detroit Red Wings and to have married a starlet from Mexico; both claims were false. The 9th Circuit considered this habit in its decision, deliberating whether there was any harm done if no one believed his many false claims.

However, under the SVA as enacted in 2005, the prosecution was not required to prove that anyone believed the untruthful claim, that the liar had obtained some benefit by the lie, nor that anyone had suffered tangible harm from the lie. The Department of Justice prosecuted Alvarez for violating the SVA. In District Court, he pled factually guilty, while reserving the right to challenge the SVA's constitutionality. Upon Mr. Alvarez's appeal to the 9th Circuit, a three-judge panel of the 9th Circuit reversed and held that the SVA was unconstitutional, in part because the SVA punished false speech alone without a requirement for harm to others or benefit to the liar.

After the 9th Circuit denied rehearing *en banc* (by the full court), the Justice Department appealed to the Supreme Court. ROA joined the Veterans of Foreign Wars and 23 other military associations in filing an *amicus curiae* (friend of the court) brief urging the Court to reverse the 9th Circuit and to uphold the constitutionality of the SVA.

In *United States v. Alvarez*, No. 11-210, a divided Supreme Court struck down the SVA. Justice Kennedy wrote the plurality decision of the Court (meaning that no one theory of why the SVA was unconstitutional gained a majority), joined by Chief Justice Roberts, and Justices Ruth Bader Ginsburg, and Sonia Sotomayor. Justice Stephen Breyer wrote a separate decision concurring in the result, and his opinion was joined by Justice Elena Kagan. Justice Samuel Alito wrote a vigorous dissent, joined by Justices Antonin Scalia and Clarence Thomas.

In his opinion, Justice Kennedy applied "intermediate scrutiny" to the question of whether the SVA, as currently drafted, implicates free speech rights and violates the First Amendment. As the name implies, intermediate scrutiny falls between "strict scrutiny" (under which it is virtually impossible for a statute to be upheld) and the "rational basis test" (under which it is rare for a statute to be struck down).

In his opinion, Justice Kennedy acknowledged that the Federal Government has a compelling interest in protecting the integrity of the military decorations process, but he suggested that the Government should find a less speech-restrictive means to advance this interest. He wrote, "In addition, when the Government seeks to regulate protected speech, the restriction must be the 'least restrictive means among available, effective alternatives.' *Ashcroft*, 542 U.S., at 666. There is, however, at least one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system. A Government-created database could list [Medal of

Honor] winners. Were a database available through the Internet, it would be easy to verify and expose false claims." (Slip opinion at 17.)

Justice Kennedy goes on to note that the Congressional Medal of Honor Society already has a searchable database of MOH recipients, available on-line at <https://www.cmohs.org/recipients>. In view of this database created by a nongovernmental organization, Justice Kennedy expresses skepticism about the Government's claim that establishing such a database is impracticable.

Justice Kennedy is conflating the Medal of Honor with military medals generally. Tracking the living Medal of Honor recipients is easy, since there are only 81 of them, but there are tens of thousands of living recipients of lesser but still very significant military medals, like the Silver Star and the Navy Cross. Establishing and maintaining a searchable database of all such medals would require considerable effort and expense.

Justice Kennedy also suggested that a more tightly drafted SVA could pass constitutional muster. Representative Joseph J. Heck of Nevada has introduced a bill (H.R. 1775) to do just that, and the *Alvarez* decision gives added impetus to that effort. That bill passed the House of Representatives by a vote of 410-3 on September 13, 2012. The bill is pending in the Senate, but the 112th Congress is almost over. This effort will most likely have to begin again in the 113th Congress (January 2013). We will keep the readers informed of progress on this important issue.

Finally, in four places in his opinion, Justice Kennedy referred to "winners" of the Medal of Honor. ROA wrote a letter to the Supreme Court Reporter of Decisions, with a copy to the Clerk of the Supreme Court (a retired major general and former judge advocate general of the Army), urging that the word "recipients" be substituted for "winners," since those who receive the award are deemed to have earned it, not won it.

The Reporter of Decisions responded, saying she will endorse our wording change suggestion to Justice Kennedy when the decision is published officially.

UPDATE: June 2013

On June 3, 2013, President Obama signed into law Public Law 113-12⁴, the "Stolen Valor Act of 2013." This is the rewrite of the Stolen Valor Act of 2005 that was made necessary by the Supreme Court decision in *United States v. Alvarez*, 567 U.S. ____ (2012).⁵

⁴The citation means that this is the 12th Public Law signed into law by the President during the 113th Congress (2013-14). In five months of this Congress, only 12 new laws have been enacted. This shows that Congress is a giant funnel. Thousands of bills are introduced, but only a relative handful of new laws are enacted.

⁵This citation means that you can find this Supreme Court decision in Volume 567 of *United States Reports*, the series of books where United States Supreme Court decisions are officially published. It takes several years for the Supreme Court Reporter of Decisions to come out with volumes of *United States Reports*, catching up with decisions that have already been unofficially published elsewhere. We know that the *Alvarez* decision will be published in Volume 567, but we do not yet know that page number where this case will start.

The Stolen Valor Act of 2005 made it unlawful for anyone to make a false claim of having received a Medal of Honor or other high military award, orally or in writing. In *Alvarez*, the Supreme Court declared the 2005 Act to be unconstitutional under the First Amendment of the United States Constitution.

The 2013 law is narrower—it makes it unlawful to claim falsely to have been awarded a military medal with intent to obtain some tangible benefit for the liar. Xavier Alvarez (the defendant in the 2012 Supreme Court case) likely would not have been convicted or even charged if the 2013 Act had been in effect at the time. Mr. Alvarez was elected to the Three Valley Water District Board in California in 2007. At the first meeting of the board after Mr. Alvarez was elected, he falsely claimed that he had served in the Marine Corps and that he had been awarded the Medal of Honor. It is important to note that Mr. Alvarez made this untruthful claim *after he had already been elected* to the board. If he had made the claim during the course of his campaign, perhaps he would have been charged under this revised law.

In any case, Mr. Alvarez cannot be charged now for the offense he committed several years ago. The Stolen Valor Act of 2013 does not apply retroactively, and such retroactive application of a criminal statute would violate Article I, Section 9 of the United States Constitution, which provides (in pertinent part) as follows: “No Bill of Attainer or ex post facto Law shall be passed.” The Stolen Valor Act of 2013 applies to conduct on or after June 3, 2013.

I believe that the Stolen Valor Act of 2013 is well drafted and that it fixes the constitutional defect found by the Supreme Court. I realize that this issue is very important to many ROA members. I believe that the 2013 law preserves as much of the 2005 law as it is possible to preserve, consistent with the 2012 Supreme Court mandate.

I congratulate Representative Joe Heck of the Third District of Nevada for his leadership in drafting this legislation and getting it enacted. He is a physician and a Colonel in the Army Reserve, selected for promotion to Brigadier General. Unfortunately, he is not a member of ROA, although he is certainly eligible. We are working on signing him up. Anybody know him?

Update – May 2022

United States v. Alvarez can be found in the United States Reports at 567 U.S. 709 (2012).