Less Than Zero: In Defense of the Tenth Circuit's Opinion in United States v. Strandlof

Sherry Metzger
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INTRODUCTION

In July 2010, Rick Strandlof was charged under the Stolen Valor Act (SVA), which makes it illegal to “falsely [represent oneself], verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.” The District court for the District of Colorado declared the SVA facially unconstitutional, reasoning that false statements are generally protected by the First Amendment unless they fall within one of the narrow categories of speech, such as fraud or defamation, that have been held as exceptions. The United States Court of Appeals for the Tenth Circuit, recognizing that the Supreme Court has observed time and again that false statements of fact do not enjoy constitutional protection, held that the SVA does not infringe protected speech and vacated this opinion and judgment. The Court decided the case while a parallel case, United States v. Alvarez, was under review by the Supreme Court.

In Alvarez, the Supreme Court considered whether criminalizing content-based speech, even false speech, survives a First Amendment challenge. The Court applies the “most exacting scrutiny” in assessing content-based restrictions on protected speech. “The Act does not satisfy that scrutiny. While the Government’s interest in protecting the integrity of the Medal of Honor is beyond question, the First Amendment requires that there be a direct causal link between the restriction imposed and the injury to be prevented.”

This comment ultimately endorses the initial ruling of the Tenth Circuit Court of Appeals in United States v. Strandlof that the SVA is not a constitutional violation of the First Amendment. Part I describes the origin of the SVA. Part II summarizes the facts, procedural history and

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3. Id. at 1186-88.
6. Strandlof, 667 F.3d at 1153.
10. Alvarez, 132 S. Ct. at 2540.
opinions of Strandlof. Part III suggests that since the Supreme Court should rethink its treatment of free speech protection for worthless or offensive speech, and that the Tenth Circuit’s “breathing space” approach is preferable because it balances protection of traditional values without unduly chilling speech.

I. ORIGIN OF STOLEN VALOR ACT

A. The Stolen Valor Act of 2005

On November 10, 2005, Senator Kent Conrad of North Dakota, concerned about “individuals who diminish the accomplishments of award recipients by using medals they have not earned,” introduced a bill to amend Title 18 of the United States Code “to enhance protections relating to the reputation and meaning of the Medal of Honor and other military decorations and awards.” In 2004, Pamela Sterner, a political science student at the Colorado State University-Pueblo, submitted a paper to her local Congressman John Salazar, Salazar then proposed the SVA of 2005. On December 20, 2006, President George W. Bush signed the SVA into law.

B. Stolen Valor Act of 2011

A revised SVA has already been passed by the House and is making its way through the Senate. Rather than focusing on those who lie about receipt of medals, the bill focuses on the aspect of criminal fraud; the making of any profits from lying about the receipt of medals. The new bill focuses on the intent “to obtain money, property or anything of value,” and enforces penalties against individuals who “fraudulently hold themselves out to be recipients of a military decoration or medal.”

II. UNITED STATES V. STRANDLOF

A. Facts

Rick Strandlof, under the alias Rick Duncan, falsely represented himself as having received Silver Star and Purple Heart medals for

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12. Title 18 of the United States Code deals with federal crimes and criminal procedure of the United States.
18. Id.
wounds he received during combat in Iraq. Under this pretense, Strandlof founded the Colorado Veterans Alliance (CVA), and solicited funds for the organization while claiming that he graduated from the United States Naval Academy and was a former U.S. Marine Corps Captain.

B. Procedural History

The United States District Court for the District of Colorado did not find a compelling government interest, despite the fact that “[s]er vicemen and women may be motivated to enlist and fight by the ideals the medals represent.” The court held that because speech criminalized by the SVA was neither fraudulent nor defamation, it did not fall within a historically recognized category protected by the First Amendment, therefore the content-based restriction could not survive strict scrutiny.

The United States Court of Appeals for the Tenth Circuit reversed the holding of the district court and held the SVA was constitutional on January 27, 2012. The court disagreed with the district court’s reading of Supreme Court precedent and noted that the “Supreme court has observed time and again, false statements of fact do not enjoy constitutional protection, except to the extent necessary to protect more valuable speech.” In other words, “so long as the laws allow ‘breathing space’ for core protected speech,” the Constitution does not prohibit laws criminalizing falsehoods.

Later that same year, on July 2, 2012, the United States Court of Appeals for the Tenth Circuit vacated the opinion and judgment against Strandlof in a one paragraph opinion, stating only that the decision was made “in light of the United States Supreme Court’s decision in [Alvarez].”

C. Majority Opinion

Circuit Judge Tymkovich delivered the opinion of the court, which held the SVA does not impinge on or chill protected speech, and is therefore constitutional. The majority concluded that the SVA “survives
scrutiny because (1) it restricts only knowingly false statements of fact, and (2) specific characteristics of the statute, including its mens rea requirement, ensure it does not overreach so as to chill protected speech.”

D. Dissenting Opinion

The dissenting opinion by Judge Jerome Holmes stated “that the First Amendment generally accords protection to such false statements of fact,” and as a content-based restriction on speech, the SVA cannot satisfy the requisite strict scrutiny.  

III. ANALYSIS

A. Stranclof Correctly Interprets the Essence and Intent of the First Amendment

The Supreme Court has historically recognized that “false-speech restrictions may violate the First Amendment when they are so suffocating as to afford inadequate breathing space for constitutionally valuable speech.” In BE&K Constr. Co. v. NLRB, the Supreme Court held that “[w]hile false statements may be unprotected for their own sake, the First Amendment requires that we protect some falsehood in order to protect speech that matters.” False statements of fact have no social value in the “marketplace of ideas” because they serve “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

B. The United States Supreme Court is Eviscerating Traditional Values by Protecting Worthless Speech

Recent Supreme Court cases upholding worthless speech are demoralizing. In April 2010, the Supreme Court held that a federal statute criminalizing the creation, sale or possession of depictions of animal cruelty was an unconstitutional violation of the First Amendment right of free speech. Similarly, in Snyder v. Phelps, the Supreme Court held that outrageous and insulting speech must be tolerated to allow breathing space. Members of the Westboro Baptist Church, founded by Fred

29. Id. at 1154.
30. Id.
31. Id. at 1158.
34. 18 U.S.C. § 48 (2006) (“Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both”).
Phelps in Topeka, Kansas, traveled to Maryland to picket the funeral\footnote{37} of Marine Lance Corporal Matthew Snyder, who was killed in Iraq in the line of duty.\footnote{38} The Supreme Court has made similarly repugnant value statements in cases of flag-burning\footnote{39} and pornography.\footnote{40}

C. Tenth Circuit’s “Breathing Space” Analysis Properly Balances Protection of Values and Speech

In Stevens, Chief Justice John Roberts rejected “a free-floating test for First Amendment coverage...an ad hoc balancing of relative social costs and benefits” of speech.\footnote{41} However, he also reasoned that “[m]aybe there are some categories of speech that haven historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”\footnote{42} In Citizens United v. Federal Election Commission, the Supreme Court stated:

There are, to be sure, serious concerns with any effort to balance the First Amendment rights of speakers against the First Amendment rights of listeners. But when the speakers in question are not real people and when the appeal to “First Amendment principles” depends almost entirely on the listeners’ perspective, it becomes necessary to consider how listeners will actually be affected.\footnote{43}

IV. CONCLUSION

The Supreme Court’s decision in Alvarez eviscerates traditional values by allowing imposters to lie about one of the most sacred of American values: Valor. This comment proposes that as long as speech is not unduly chilled, there exist certain forms of expression that are so worthless as to not warrant First Amendment protection to the speaker, rather we ought to be concerned with protecting the listener.\footnote{44} Furthermore, the Tenth Circuit was on the right track in creating an appropriate balance of protection of values and the freedom of speech by upholding the SVA, and by applying the “breathing space” analysis.

\footnote{37} The Congregation of Westboro Baptist church has picketed military funerals for the past 20 years to communicate its belief that God hates the United States for its tolerance of homosexuality. \textit{Id.} at 1210.

\footnote{38} \textit{Id.} at 1212.

\footnote{39} \textit{United States v. Eichman}, 496 U.S. 310, 318-319 (holding a federal flag protection statute was an infringement on political protestors’ First Amendment rights); To contrast Supreme Court Jurisprudence with that of the Tenth Circuit see e.g., \textit{Winsness v. Yocum}, 433 F.3d 727 (10th Cir. 2006).

\footnote{40} See e.g., \textit{Hustler Magazine, Inc. v. Falwell}, 485 U.S. 46.

\footnote{41} \textit{Stevens}, 130 S. Ct. at 1585.

\footnote{42} \textit{Id.} at 1586.

\footnote{43} 130 S.Ct. 876, 976 (2010).

\footnote{44} See supra section III.