

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Xavier Alvarez is charged under a law that criminalizes making a false claim to having received a military decoration. The law does not require proof of fraud, that is that the false statement was made in order to obtain some benefit. It does not require any showing that the statement caused reliance or was material. It does not even require that the speaker know the statement is false. It simply criminalizes the incorrect claim to certain military decorations in every context.

The law is unconstitutional, both facially and specifically as applied to Mr. Alvarez. Falsehoods are not outside the realm of First Amendment protection, and therefore restrictions on false statements must be supported by a strong government interest and must be directly related to that interest. The Court’s scrutiny of the law should be especially demanding here, where the statement was made by an elected official, during a public meeting, on an issue of public concern: his qualifications for office. The Government’s stated interest in this law, protecting the reputation of military decorations, is insufficient to survive this exacting scrutiny. For this reason, the statute is unconstitutional as applied to Mr. Alvarez and the indictment should be dismissed.

II. Statement of Facts

Xavier Alvarez is an elected member of the Three Valleys Water District Board. See Exhibit A. The indictment charges a violation of 18 U.S.C. § 704(b) in that, on July 23, 2007, Mr. Alvarez claimed to have received the Congressional Medal of Honor, when in fact he had not received that award. The discovery presents the following version of events:¹ On July 23, 2007, Mr. Alvarez attended the Walnut Valley Water District Board Meeting. As a “newly elected” director, he was invited to introduce himself to the Board. During that introduction, Mr. Alvarez stated: “Back in 1987, I was

¹ The defense does not, by this recitation, intend to concede this version of facts.

1 awarded the Congressional Medal of Honor.” See Exhibit B. The Government claims
2 that Mr. Alvarez’s name does not appear in the official records of those who have been
3 awarded a Congressional Medal of Honor.

4
5 III. Analysis

6 A. Section 704(b) is Unconstitutional As Applied to Mr. Alvarez Because The
7 Government’s Interest in Protecting the Reputation of Military Decorations
8 is Insufficient to Support this Content-Based Restriction on Speech by a
9 Political Figure on a Matter of Public Interest.

10 False speech is protected speech. It is true that “neither the intentional lie nor the
11 careless error materially advances society’s interest in uninhibited, robust, and wide-
12 open debate on public issue.” Gertz v. Welsh, 418 U.S. 323, 340 (1974) (internal
13 citations omitted). And yet, the Supreme Court has recognized that false statements of
14 fact are “inevitable in free debate.” Id. If erroneous speech is punished, the risk is that
15 speakers will be “cautious and restrictive” in the exercise of their constitutionally
16 protected freedoms, which may lead to “intolerable self-censorship.” Id. In addition,
17 there is an ever-present concern about placing judgments about truth and falsity in the
18 hands of judges and juries. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964)
19 (“Authoritative interpretations of the First Amendment have consistently refused to
20 recognize an exception for any test of truth -- whether administered by judges, juries, or
21 administrative officials”); Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson,
22 J., concurring) (“The very purpose of the First Amendment is to foreclose public
23 authority from assuming a guardianship of the public mind through regulating the press,
24 speech, and religion. In this field every person must be his own watchman for truth,
25 because the forefathers did not trust any government to separate the true from the false
26 for us.”). For both of these reasons, “the First Amendment requires that we protect some
27 falsehood in order to protect speech that matters.” Gertz, 418 U.S. at 341. “Erroneous
28 statements . . . must be protected if the freedoms of expression are to have the ‘breathing

1 space' they need to survive." Brown v. Hartlage, 456 U.S. 45, 60-61 (1982) (citations
2 omitted).

3 Courts have said that false statements are not entitled to the same level of
4 protection as truthful statements, see id. at 60, but have not quantified precisely what that
5 means. What is clear is that the basic bedrocks of judicial review of laws implicating
6 speech are unchanged. From defamation cases, it is clear that even in the context of false
7 statements, courts consider the weight of the government interest behind the law. See
8 Gertz, 418 U.S. at 348 (noting the "strength of the legitimate state interest in
9 compensating private individuals for wrongful injury to reputation.") It also clear that
10 courts have examined the fit of the law to that purpose. See id. at 349 ("It is therefore
11 appropriate to require that state remedies for defamatory falsehood reach no further than
12 is necessary to protect the legitimate interest involved.").

13 Indeed, a stricter review is necessary in this context than in libel and defamation
14 context because this law is a content-based restraint on protected speech. See
15 Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537-38 (1980) ("The
16 First Amendment's hostility to content-based regulation extends not only to restrictions
17 on particular viewpoints, but also to prohibition of public discussion of an entire topic.").
18 Content-based restrictions are "presumptively inconsistent with the First Amendment."
19 See Simon & Schuster v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115-
20 16 (1991). Thus, the Court's review of this law, both the Government's stated purpose
21 and its chosen means, should be exacting.

22 Finally, the Court's review of the law as applied to Mr. Alvarez should be
23 especially demanding, because Mr. Alvarez made the statement in his capacity as a
24 member of the Three Valley Municipal Water District Board. Mr. Alvarez was a newly
25 elected public official and was asked during a public meeting to introduce himself. The
26 statement that gave rise to the instant charge was made while Mr. Alvarez was
27 explaining his qualifications during that introduction.

28 ///

1 It is clear under those facts that the law should be subjected to even higher
2 scrutiny as applied to Mr. Alvarez. Government intrusion into speech made by
3 politicians is particularly suspect. Discussions of qualifications of political candidates
4 is considered core political speech to which the highest scrutiny is afforded. See
5 McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 346 (1995). The statements of an
6 elected politician about his qualification for the office he holds -- especially one who
7 must run for re-election to keep his job -- is similarly close to the heart of the First
8 Amendment. As applied in this case, the law impinges on a statement by a politician on
9 an issue of public concern, and should therefore be carefully scrutinized. See Dun &
10 Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) (“[S]peech on
11 public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’
12 and is entitled to special protection.”) (quoting NAACP v. Claiborne Hardware Co., 458
13 U.S. 886, 913 (1982)).

14 Taken together, the First Amendment interests at stake in this case are particularly
15 weighty. In light of these interests, the rationale underlying this law is insufficient. The
16 legislative history accompanying the most recent amendment to 18 U.S.C. § 704 states
17 that the purpose behind the law is that “[f]raudulent claims surrounding [military
18 decorations] damage the reputation and meaning of such decorations and medals.” See
19 Stolen Valor Act, P.L. 109-437 (December 20, 2006), attached as Exhibit C. While
20 protecting the reputation of military decorations is not an illegitimate government
21 pursuit, it is certainly not compelling and does not survive in the First Amendment
22 context.

23 Courts have struck down laws grounded in such “symbolic” interests. In Texas
24 v. Johnson, 491 U.S. 397 (1989), the Supreme Court considered Texas’s interest in
25 prohibiting flagburning. The State phrased its interest as “preserving the flag as a
26 symbol of nationhood and national unity.” Id. at 413. The Court recognized the “special
27 place reserved for the flag” and the legitimate interest in preserving the flag as the
28 “unalloyed symbol of our country.” Id. at 418. The Court held, however, that the state

1 cannot create a protective fence around certain symbols and limit the kinds of messages
2 that can be made concerning those symbols. See id. at 417. It said that “[t]o conclude
3 that the government may permit designated symbols to be used to communicate only a
4 limited set of messages would be to enter territory having no discernable of defensible
5 boundaries.” See id.; see also Lighthawk v. Robinson, 812 F. Supp. 1095, 1101-02
6 (W.D. Wash. 1993) (holding that the Government’s interest in protecting the purity of
7 the Smokey the Bear icon as a symbol of fire prevention was insufficient to warrant a
8 content-based restriction on speech). The bottom line is that the state cannot make
9 certain symbols so sacrosanct as to exempt them from the normal rules regarding truth
10 and falsity. If protecting the flag as a symbol of nationality unity does not rise to the
11 level of compelling, it is impossible to say that protecting the reputation of military
12 decorations would.

13 It is also problematic to allow Congress to decide which symbols deserve
14 protection. As the Court recognized in Johnson, to christen some national symbol as
15 sacred would require judges and lawmakers “to consult [their] political preferences, and
16 impose them on the citizenry in the very way the First Amendment forbids us to do.”
17 Johnson, 491 U.S. at 417. Such value judgments simply should not be legislated.

18 For these reasons, Section 704(b) is unconstitutional as applied to Mr. Alvarez.
19 The stated interest does not support such a significant intrusion into protected speech.

20
21 B. Section 704(b) Is Unconstitutional Because It Is Not Carefully Tailored to
22 the Government Interest

23 Even if protecting the integrity of military decorations were a sufficiently weighty
24 interest, Section 704(b) is also unconstitutional because it reaches farther than necessary
25 to protect that interest. See Gertz, 418 U.S. at 349 (“It is . . . appropriate to require that
26 state remedies for defamatory falsehood reach no further than is necessary to protect the
27 legitimate interest involved.”). There is no reason to think that criminal prosecution is

28 ///

1 necessary, i.e., that civil fines would not work to ensure that false claims of military
2 decorations are not lightly made.

3 More importantly, there is no reason to believe that counter-speech is not an
4 ineffective method of protecting the Government's interest. The Supreme Court has
5 often noted that "[w]henver compatible with the underlying interests at stake, under the
6 regime of [the First Amendment], we depend for correction not on the conscience of
7 judges and juries but on the competition of other ideas." Brown, 456 U.S. at 61
8 (citations omitted). That is, wherever possible, the preferred remedy for false speech is
9 more speech. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)
10 ("If there be time to expose through discussion the falsehood and fallacies, to avert the
11 evil by the processes of education, the remedy to be applied is more speech, not enforced
12 silence.") (overruled on other grounds).

13 In some cases, such a regime is not tolerable. For example, false statements made
14 to consumers that fall within the realm of commercial speech can be regulated, in part,
15 because consumers often make decisions on the spot based on packaging or in-store
16 marketing without time for the seller's ideas to be fully tested. See Rubin v. Coors
17 Brewing Co., 514 U.S. 476, 495-96 (Stevens, J., concurring) (1995). So too, in the realm
18 of libel, it is believed that falsehoods cannot be remedied by counter-speech: harm to
19 a person's reputation is often immediate upon the falsehood becoming public, and later
20 corrections are frequently ineffectual to remedy the damage to a person's reputation. See
21 Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988)

22 That is not the case here. The goal of 18 U.S.C. § 704(b) is to ensure that the
23 value of the military decoration is not tainted by the false claims of those who have not
24 received them. But cases of false claims of military decorations have not gone unnoticed
25 or unchallenged. In fact, it was no doubt the public exposure of claimants that spurred
26 Senator Conrad to believe that the Stolen Valor Act was necessary. Certainly public
27 exposure of those who have falsely claimed to have received a military decoration is
28 sufficient to protect the meaning of the medal to true military honorees. In fact, the

1 public outcry at such false claims is strong evidence that the reputation of these military
2 honors is not endangered in the least. See Johnson, 491 U.S. at 418-20 (noting that the
3 public reaction to flag burning indicated that the value of the flag as a symbol of national
4 unity is not threatened by such conduct).

5 These are not mere theoretical ideas. In fact, this is how things played out in Mr.
6 Alvarez's case. According to the discovery, Mr. Alvarez was challenged on various
7 occasions by the people to whom the statements were made. He was questioned about
8 his claim by colleagues. There have been newspaper articles and internet blogs
9 investigating his claims. See Exhibit D. This is precisely what should happen. If a
10 person is believed to have made a false statement, that statement should be challenged,
11 explained, countered, or disproved, so that everyone can come to their own conclusion
12 about the truth of the matter. The value of the Congressional Medal of Honor is not
13 threatened by allowing the normal processes of truth-gathering and public debate to
14 occur. Because the law is not necessary to protect the stated government interest, it does
15 not survive the demanding scrutiny given to legislation that impinges important First
16 Amendment rights. The proper remedy in these cases is more speech, not criminal
17 prosecution.

18 19 C. The Law is Overbroad

20 A law is overbroad if it "does not aim specifically at evils within the allowable
21 area of State control but, on the contrary, sweeps within its ambit other activities that in
22 ordinary circumstances constitute an exercise of freedom of speech" Thornhill v.
23 Alabama, 310 U.S. 88, 97 (1940); see also Clark v. City of Los Angeles, 650 F.2d 1033,
24 1039 (9th Cir.1981). The Supreme Court has required that the overbreadth "not only be
25 real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."
26 Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

27 Section 704(b) is overbroad because it has no scienter requirement. "The
28 existence of a mens rea is the rule of, rather than the exception to, the principles of

1 Anglo-American criminal jurisprudence.” Dennis v. United States, 341 U.S. 494, 500
2 (1951); see also Morissette v. United States, 342 U.S. 246, 250- 52 (1952). Thus, to
3 determine whether section 704(b) is constitutional as written, the Court must examine
4 whether any well-recognized exception to the need for a mens rea requirement exists.
5 None do in this case.

6 First, strict liability offenses are common in areas that are highly regulated,
7 particularly those that are regulated for public safety. See id., 342 U.S. at 256-59. But
8 the content of one’s speech is not area that is generally subject to strict public regulation.
9 In fact, the “First Amendment constraints presuppose the opposite view.” United States
10 v. X-citement Video, 513 U.S. 64, 71 (1994) (noting this presupposition in the context
11 of the contents of magazines and films).

12 Second, the penalties that attach to the violation are significant in determining
13 whether the statute should be construed not to have a mens rea; minor infractions or
14 offenses punishable only by fine are often strict liability offenses. See Staples v. United
15 States, 511 U.S. 600, 616 (1994). Here, a violation of section 704(b), where the
16 decoration claimed is a Congressional Medal of Honor, is a Class A misdemeanor,
17 punishable by jail time, by probation, or by fine. See 18 U.S.C. § 704(c)(1). The
18 possible punishment is not so negligible as to support omitting the scienter requirement.

19 The third exception relates to cases where Congress specifically intended to
20 exclude a mens rea requirement. But the lack of a scienter element on the face of the
21 statute is not sufficient to evidence such intent. See United States v. U.S. Gypsum Co.,
22 438 U.S. 422, 438 (1978) (“[F]ar more than the simple omission of the appropriate
23 phrase from the statutory definition is necessary to justify dispensing with an intent
24 requirement.”). Nothing in the legislative history explicitly expresses an intent to
25 include those mistaken about their status as it related to military decorations.

26 Thus none of the well-recognized exceptions to the mens rea requirement apply.
27 In addition, courts are particularly loathe to sanction strict liability offenses where the
28 law impinges on speech. See Smith v. State of California, 361 U.S. 147, 150-54 (1959)

