

Stolen Valor: Supporting and Defending Another's Right to Lie¹

Neysa M. Slater-Chandler
Virginia Tech

Abstract

The United States Supreme Court's recent decision (plurality) in *U.S. v. Alvarez* (567 U.S. ___, 132 S.Ct. 2537) has met with derision in some circles and support in others. The Court stated, "content-based restrictions on speech have been permitted only for a few historic categories of speech" and emphasized, "absent from these few categories is any general exception for false statements."

Before the ink was dry (or the bits settled), and even in anticipation of the decision, veterans groups, elected representatives, and other public and private figures were already acting. This paper will review the Supreme Court's decision, the public discourse underway before, during, and after the decision, and proposals that will affect both veterans and non-veterans with an eye towards providing keys to encourage discourse on this emotional subject while "making democracy work in a constitutional republic."

Keywords: Supreme Court, Alvarez, Stolen Valor, veteran, military award, Medal of Honor, First Amendment, freedom of speech, protected speech

¹ By Neysa M. Slater-Chandler. © Neysa M. Slater-Chandler, 2013. The views expressed are those of the author and not of the U.S. Government. The author would like to thank her husband, Major Daniel K. Chandler, U.S. Army (Retired), her mother, Mrs. Janice L. Slater, Dr. Karen Hult, and Brigadier General Harry H. Bendorf, U.S. Air Force (Ret.) for their contributions to this paper.

With these words, Justice Anthony Kennedy entered the Supreme Court into the ongoing public discourse about military service and the awards received for valorous and honorable service. The opinions delivered in *United States v. Alvarez* (567 U.S. ___, 132 S.Ct. 2537 (2012)) – and they were *opinions*, for this was a plurality with a healthy dissent – paralleled public opinions. Before the ink was dry (or the bits settled) on the decision, and even in anticipation of it, veterans groups, elected representatives, and other public and private figures were acting.

Xavier Alvarez was a board member of the Three Valley Water District Board in Claremont, California. Alvarez introduced himself as a retired Marine and recipient of the Congressional Medal of Honor, claiming he “got wounded many times by the same guy.” (132 S.Ct. at 2542) Alvarez was indicted under the Stolen Valor Act, which made it a crime to falsely claim receipt of military decorations with an enhanced penalty if the claim included the Congressional Medal of Honor. He pled guilty to one count, reserving the right to appeal on a First Amendment claim that the act was unconstitutional. His case found its way to the Supreme Court because of a conflict between the Ninth Circuit (which found the act invalid) and Tenth Circuit (which did not). The Supreme Court agreed with the Ninth Circuit and found that the Stolen Valor Act infringed upon speech protected by the First Amendment. (132 S.Ct. at 2539)

Justice Kennedy wrote that Alvarez’s statements “were but a pathetic attempt to gain respect that eluded him.” (132 S.Ct. at 2542) Stating that “content-based restrictions on speech have been permitted only for a few historic categories of speech,” the Supreme Court emphasized, “absent from these few categories is any general exception for false statements.” (132 S.Ct. at 2539) The Court’s decision met with derision in some circles and support in others.

This paper will review the Supreme Court’s decision and the public discourse surrounding it to encourage discourse while “making democracy work in a constitutional republic.”²

Early Distinction: A Patriot Army

The importance of decorations and honors is not unique to the United States military, and the tradition traces its lineage to ancient times. The government recognizes individuals, including civilians, for meritorious acts through awards and decorations. Many have pointed to General George Washington’s order issued at Newburgh, New York, on August 7, 1792. Portions of his order will help inform our discourse:

Honorary Badges of distinction are to be conferred on the veteran Non commissioned officers and soldiers of the army who have served more than three years with bravery, fidelity and good conduct . . . it is expected those gallant men who are thus designated will on all occasions be treated with particular confidence and consideration.

The General ever desirous to cherish virtuous ambition in his soldiers, as well as to foster and encourage every species of Military merit, directs that whenever any singularly meritorious action is performed, the author of it shall be permitted to wear on his facings over the left breast, the figure of a heart in purple cloth, or silk, edged with narrow lace or binding. Not only instances of unusual gallantry, but also of extraordinary fidelity and essential service in any way shall meet with a due reward....

² The motto of Virginia Tech’s Center for Public Administration and Policy. Thanks also go to Virginia Tech for sponsoring this first conference on veterans’ issues, and to the students, faculty, and staff for their dedication and hard work done in making the conference a success.

The road to glory in a patriot army and a free country is thus open to all. This order is also to have retrospect to the earliest stages of the war, and to be considered as a permanent one.

The design of this decoration was later incorporated into the design of the Purple Heart.

Fast forward to the Twentieth Century. Bookended by legislation granting Boise, Idaho, use of land that was part of the Boise Barracks Military Reservation and legislation authorizing the loaning of 3000 wooden folding chairs to be used by the United Confederate Veterans at their reunion to be held in New Orleans in April 1923, was “An Act to prohibit the unauthorized wearing, manufacture, or sale of medals and badges awarded by the War Department.”

That hereafter the wearing, manufacture, or sale of the congressional medal of honor, distinguished service cross, distinguished service medal, or any of the services medals or badges awarded by the War Department, or the ribbon, button, or rosette thereof of the form as is or may hereafter be prescribed by the Secretary of War, or of any colorable imitation thereof, is prohibited, except when authorized under such regulations as the Secretary of War may prescribe. Any person who offends against the provisions of this section shall, on conviction, be punished by a fine not exceeding \$250 or by imprisonment not exceeding six months, or by both such fine and imprisonment.

The legislation passed on February 24, 1923³ and was amended several times. For example, in 1928, the Distinguished Flying Cross was added, recognizing the dawn of manned military flight, as was “any decoration authorized by Congress for the military forces,” recognizing awards given out by the Navy Department.

With the Stolen Valor Act of 2005, Congress made the following findings:

1. Fraudulent claims surrounding the receipt of the Medal of Honor, the Distinguished-Service Cross, the Navy Cross, the Air Force Cross, the Purple Heart, and other decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals.
2. Federal law enforcement officers have limited ability to prosecute fraudulent claims of receipt of military decorations and medals.
3. Legislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals. (Public Law 109-437)

The Act amended 18 U.S.C. § 704 and added more sweeping language:⁴

(b) False claims about receipt of military decorations or medals. 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.

(c) Enhanced penalty for offenses involving Congressional Medal of Honor.

(1) In general. If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.

³ How heart-warming that support was being given to the Confederate Veterans’ reunion; how quickly action was expected to be taken to get those chairs where they needed to be. Could Congress move so quickly now?

⁴ Title 18 is the “Crimes and Criminal Procedure” part of the U.S. Code.

The Right to Lie

U.S. v. Alvarez was handed down the same day as the decision upholding the Affordable Care Act. SCOTUS blog reported that it had more than 866,000 readers that day, most of whom were waiting to hear the fate of “Obamacare.” Much to their surprise, they first heard about one’s constitutional right to lie in the six minutes it took to deliver the opinion in *U.S. v. Alvarez*, the first opinion read. To Supreme Court watchers, the alignment of the justices was interesting. Justice Kennedy delivered the opinion, joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor. Justices Breyer and Kagan concurred. Justice Alito dissented, joined by Justices Scalia and Thomas.

While agreeing that creating and protecting awards (and specifically the Congressional Medal of Honor) are legitimate government objectives, the Court stated, “Fundamental constitutional principles require that laws enacted to honor the brave must be consistent with the precepts of the Constitution for which they fought.” (132 S.Ct. at 2543) The Court applied what it called “exacting” scrutiny (the term more often used is “strict” scrutiny) and held that content-based restrictions on speech are presumed invalid. The Court noted that it had twice in two terms “consider[ed] speech that can disparage, or attempt to steal, honor that belongs to those who fought for this Nation in battle,” pointing to its decision in *Snyder v. Phelps* (562 U.S. ___, 131 S.Ct. 1207) allowing “hateful protests” at a serviceman’s funeral.

In enumerating its concerns, the Court stated that a decision upholding the law would permit the government to compile a list of subjects about which false statements are punishable. (132 S.Ct. at 2547) The government argued that false statements have no First Amendment value in themselves, but the Court warned, “. . . false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation.” (132 S.Ct. at 2544) The Court found the act to be too sweeping, since it could be enforced against any person, at any place and any time. The Court stated that there must be a “direct causal link between the restriction imposed and the injury to be prevented,” and Justice Kennedy further pointed out, “The remedy for speech that is false is speech that is true.” (132 S.Ct. at 2549, 2550)

The Public Discourse

With its opinion, the Supreme Court entered the public discourse and, in fact, allowed the discourse to continue. Turning to a Justice Holmes dissent, the court noted, “The theory of our Constitution is ‘that the best test of truth is the power of the thought to get itself accepted in the competition of the market.’” (132 S.Ct. at 2550) The Stolen Valor Act was sweeping and not sufficiently and narrowly tailored because no intent was required to break the law, the lie did not have to be publicly witnessed, and even fiction and satire were violative. Further, the Court found that there was no causal link between the government’s interest in protecting the integrity of the military honors system and restrictions on false claims or lies, and that there was no evidence to support the argument that the public’s general perception of military awards would be diluted by these false claims. In its Civics 101 lesson for the day, the Court reminded us, “Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person.” (132 S.Ct. at 2550)

While encouraging the government to re-write the law, the Court also turned to a modern solution and recommended the creation of a searchable database to assist in ferreting out scoundrels. “The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.” (132 S.Ct. at 2550) The Court even went so far as to remind us that ridicule itself is a

remedy. And the public has answered the call. The Fake Warriors Project has added to its homepage since last October the following footer: “We are part of the Supreme Court’s answer to fake warriors!”⁵

As military retirees, my husband and I were entered into the public discourse through our professional affiliations. Here is just a sample of what landed on our doorsteps (both real and virtual) containing reporting, opinions, and recommended courses of action:

1. *Reveille*: Newsletter of the Military Lawyers Conference of the American Bar Association’s Public Sector Lawyers Division
2. *Echoes*: Newsletter for Retired Soldiers, Surviving Spouses, and Families
3. American Legion Magazine
4. *The Washington Post* reports and editorials

The other branches of government also answered the Supreme Court’s call. Congress anticipated the verdict, and legislation was already in progress in 2011 and 2012. With a new Congress seated in 2013, legislation was introduced in January and February as the Stolen Valor Act of 2013, with bipartisan support in both houses, amending the subsection to read:

- (b) Fraudulent Representations About Receipt of Military Decorations or Medals-
Whoever, with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration or medal described in subsection (c)(2) or (d) shall be fined under this title, imprisoned not more than one year, or both.

The legislation is crafted to remedy the overreaching overruled by the Supreme Court and includes language carried over from the 2012 version. Senator Webb of Virginia inserted the phrase “other tangible benefit” to replace the language found offensive to the First Amendment.⁶

For its part, the executive branch created a new database that is being populated with information on military awardees.⁷ Already in existence for executive branch employers to verify veterans’ claims are the Office of Personnel Management’s OPM SF-813, used to verify non-wartime campaigns or expeditions, and the National Personnel Records Center and Service personnel commands. A planned rollout of a newly designed medal for drone pilots and cyberwarriors was scrapped as probable collateral damage.

Other interested parties include the historians, collectors, museums, and legitimate dealers in military memorabilia. Although the Stolen Valor Act has been re-drafted to answer the Supreme Court’s ruling, concern surrounding the Act has effectively halted legitimate trade in medals, passing on of history, and even conveyance of family heirlooms. This creates a problem for collectors and museums as well as those interested in private property rights.⁸

Continuing the Public Discourse

So, does the public “get it”? Can we make democracy work in a constitutional republic? Was the Supreme Court correct in averring that there was no evidence to support the argument that the public’s general perception of military awards would be diluted by these false claims? Or is this a “military veterans only” issue?

⁵ The site was established at www.fakewarriors.com. Link provided for informational purposes only. No endorsement is intended.

⁶ Jeremy Herb, “Senate Passes ‘Stolen Valor’ Rewrite in Defense Bill.”

⁷ The site is valor.defense.gov, a subdivision of the Department of Defense website.

⁸ Interview with Brigadier General Harry H. Bendorf, U.S. Air Force (Retired), past president, Orders and Medals Society of America.

I think the public does get it. The *Washington Post* (motto: "If you don't get it, you don't get it") recently ran an article on another man who lied – a man who lied and stole food for fellow Prisoners of War held in North Korea. He received the Congressional Medal of Honor for his service to his fellow captives as a Prisoner of War in North Korea.⁹ He was awarded the medal in 2013 over 60 years after his death. The Post's article about this "good thief" was answered by a letter to the editor reminding readers that in addition to a church in Kansas, a high school and a U.S. military air station are named for him.¹⁰ And, Captain Emil Kapaun, United States Army, Congressional Medal of Honor awardee, is being considered by the Roman Catholic Church for sainthood. Valor not stolen, but remembered.

⁹ Krissah Thompson, "The Priest Who Kept Their Faith."

¹⁰ Caroline Pickens, "Father Kapaun, Never Forgotten."

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Author

NEYSA M. SLATER-CHANDLER, neysas@dnfsb.gov

Neysa M. Slater-Chandler is a U.S. government attorney in Washington, D.C. A graduate of the Naval Academy, she served for over 21 years in active duty and reserve assignments, including a recall in September 2001, in communications, intelligence, and personnel management. Neysa also served as an Air Force civilian intelligence analyst and has completed the National Senior Intelligence Course and the Federal Executive Institute.

Stolen Valor: Supporting and Defending Another's Right to Lie

**Presented by Neysa M. Slater-Chandler
Mt Vernon, Virginia (nslater@vt.edu)
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The opinions expressed are those of the author's and not of the U.S. government.

Agenda

- **Introduction**
- **Oath of Office**
- **First Amendment**
- **Early Distinction: A Patriot Army**
- **An Act to prohibit the unauthorized wearing, manufacture, or sale of medals and badges awarded by the War Department**
- **18 U.S.C. § 704**
- **United States v. Alvarez**
- **The Other Branches of Government React**
- **The Public Discourse**

Oath of Office

I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same ...

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Early Distinction: A Patriot Army

Honorary Badges of distinction are to be conferred on the veteran Non commissioned officers and soldiers of the army who have served more than three years with bravery, fidelity and good conduct; for this purpose a narrow piece of white cloath of an angular form is to be fixed to the left arm on the uniform Coat. Non commissioned officers and soldiers who have served with equal reputation more than six years are to be distinguished by two pieces of cloth set in parellel to each other in a simular form; should any who are not entitled to these honors have the insolence to assume the badges of them they shall be severely punished. On the other hand it is expected those gallant men who are thus designated will on all occasions be treated with particular confidence and consideration.

General George Washington

Head Quarters, Newburgh, Wednesday, August 7, 1792

An Act to prohibit the unauthorized wearing, manufacture, or sale of medals and badges awarded by the War Department

That hereafter the wearing, manufacture, or sale of the congressional medal of honor, distinguished service cross, distinguished service medal, or any of the services medals or badges awarded by the War Department, or the ribbon, button, or rosette thereof of the form as is or may hereafter be prescribed by the Secretary of War, or of any colorable imitation thereof, is prohibited, except when authorized under such regulations as the Secretary of War may prescribe.

Any person who offends against the provisions of this section shall, on conviction, be punished by a fine not exceeding \$250 or by imprisonment not exceeding six months, or by both such fine and imprisonment.

Approved, February 24, 1923

18 U.S.C. § 704

(b) False claims about receipt of military decorations or medals.
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.

(c) Enhanced penalty for offenses involving Congressional Medal of Honor.

(1) In general. If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.

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

- **Lying was his habit**
- **Water District Board Member in California**
- **Claimed to be a retired Marine, recipient of Congressional Medal of Honor, “wounded many times by the same guy”**
- **Indicted under Stolen Valor Act for lying**
- **Pled guilty to one count, reserving right to appeal on First Amendment claim**

United States v. Alvarez (con' t)

- **Legitimate government objective**
- **“Laws enacted to honor the brave must be consistent with the precepts of the Constitution for which they fought”**
- **“Exacting” scrutiny: The Constitution demands that content-based restrictions on speech be presumed invalid**
- **Intermediate scrutiny: substantially related**

United States v. Alvarez (con' t)

- **Government argued that false statements have no First Amendment value in themselves**
- **Court: False statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation**
- **Act too sweeping (any person, any place, any time)**
- **Must be a direct causal link between the restriction imposed and the injury to be prevented**
- **The remedy for speech that is false is speech that is true**

The Other Branches of Government React: Congress

Stolen Valor Act of 2013

(a) In General- Section 704 of title 18, United States Code, is amended—

(1) in subsection (a), by striking “wears,”; and

(2) so that subsection (b) reads as follows:

(b) Fraudulent Representations About Receipt of Military Decorations or Medals- Whoever, with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration or medal described in subsection (c)(2) or (d) shall be fined under this title, imprisoned not more than one year, or both.

The Other Branches of Government React: The Executive Branch

New:

- <http://valor.defense.gov/>
- **Military Awards for Valor: Top 3**

Already in existence:

- **OPM SF-813 (to verify non-wartime campaigns or expeditions)**
- **National Personnel Records Center or Service personnel command**
- **To order your record or that of a relative's (if next of kin):**
<http://www.archives.gov/veterans/military-service-records/index.html>

The Public Discourse: Just a Sample of What Landed on My Doorsteps (Real and Virtual)

- ***Reveille*: Newsletter of the Military Lawyers Conference of the American Bar Association's Public Sector Lawyers Division**
- ***Echoes*: Newsletter for Retired Soldiers, Surviving Spouses, and Families**
- ***American Legion Magazine***
- ***Washington Post* reports, editorials**

The Public Discourse: Other Interested Parties

18 U.S.C. 704 (a)

(a) In General.— Whoever knowingly wears, purchases, attempts to purchase, solicits for purchase, mails, ships, imports, exports, produces blank certificates of receipt for, manufactures, sells, attempts to sell, advertises for sale, trades, barter, or exchanges for anything of value any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof, except when authorized under regulations made pursuant to law, shall be fined under this title or imprisoned not more than six months, or both.

Discussion

- **Continuing the Public Discourse**
- **Making Democracy Work in a Constitutional Republic**