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JOURNAL of LAW REFORM ONLINE

COMMENT

IS HONOR TANGIBLE PROPERTY?

James Santiago*

United States Marine Corps Sergeant Dakota Meyer said, “When they told me that I would be receiving the Medal of Honor I told them that I didn’t want it, because I don’t feel like a hero.”¹ This statement reflects the feelings of many real war heroes who deserve and are given recognition yet feel that they are unworthy of such accolades. Unfortunately, there are also individuals who want the recognition of being a war hero but lie about having served. Nevertheless, the First Amendment will continue to guarantee the freedom of speech of those who lie about unearned military honors unless the government can establish a compelling interest and pass narrowly tailored legislation to effectuate that interest. In this context, the compelling government interest is to protect tangible benefits for veterans from people who lie about military service in an attempt to falsely obtain those benefits. Although there are a limited number of permissible content-based restrictions under the First Amendment—inciting imminent lawless action, defamation, speech integral to criminal conduct, child pornography, and actual threats²—false statements about military awards are not included on that list.³ With that in mind, the Supreme Court held in *United States v. Alvarez* that the Stolen Valor Act of 2005,⁴ which made it a crime for anyone to make false claims about receipt of military decorations or medals, was an unconstitutional infringement on protected First Amendment speech.⁵ Both the Senate and the House, in response to the ruling,

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1. David Martin, *Bearing Both the Medal of Honor and Trauma*, CBS NEWS (Sept. 27, 2012, 9:13 PM), http://www.cbsnews.com/8301-3445_162-57518386/bearing-both-the-medal-of-honor-and-trauma/.

2. *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality opinion).

3. *See id.*

4. Stolen Valor Act of 2005, 18 U.S.C. § 704 (2006).

5. *Alvarez*, 132 S. Ct. at 2551.

proposed amending legislation to the Stolen Valor Act.⁶ Each amending bill has its own advantages and disadvantages, but a more refined combination of the two bills will be necessary in order for a new Act to be effective and constitutional.

In a concurring opinion in *Alvarez*, Justice Breyer suggested that the Stolen Valor Act might survive if it were narrower in scope and not overly restrictive of protected speech.⁷ That is, it may pass constitutional muster if it were more narrowly tailored to achieve the government's compelling interest of protecting the tangible benefits for service members. An example of this type of narrower legislation is a statute passed in response to the Court's holding in *Snyder v. Phelps*.⁸ In *Snyder*, the Court held that protestors from the Westboro Baptist Church, who picket military funerals because they believe that God hates the United States for its tolerance of homosexuality, are entitled to First Amendment protection during these protests.⁹ In response, the government enacted a law that imposed restrictions on the location and times of protests, requiring that protests be at least 300 feet away from and two hours before or after funeral services.¹⁰ Although this statute's constitutionality has not been tested, the law does address the concern of how to protect freedom of speech while simultaneously limiting inflammatory speech with restrictions that are narrow in scope. The *Alvarez* Court was similarly concerned about the Stolen Valor Act's overly broad restrictions on the freedom of speech in the form of its potential application to "limitless times and settings."¹¹ Congress should amend the Stolen Valor Act to narrowly serve the compelling interest of protecting tangible benefits for veterans by singling out for criminalization the most harmful instances of lying about military awards and service. This revision will parallel the narrow tailoring achieved in the post-*Snyder* statute.

Both of the proposed bills would limit the Stolen Valor Act to cover only cases of lying with a prerequisite intent, namely when

6. Military Service Integrity Act of 2012, S. 3372, 112th Cong. (2012); Stolen Valor Act of 2012, H.R. 1775, 112th Cong. (2012).

7. *Alvarez*, 132 S. Ct. at 2551 (Breyer, J., concurring).

8. 131 S. Ct. 1207, 1220 (2011).

9. *Id.* at 1213, 1220.

10. 18 U.S.C. § 1388.

11. *Alvarez*, 132 S. Ct. at 2547.

someone tries to gain a tangible benefit.¹² This is an important qualification because it helps to narrowly tailor the Act to serve the compelling government interest at issue: protecting tangible benefits for veterans. It also addresses the hypothetical of whether or not someone in a theatrical performance—whose speech falls within the statute’s purview—could be charged with a crime, an example commentators employ to show the tailoring problems the Act faces.¹³

In the Senate bill,

[T]angible benefit or personal gain includes

- (A) a benefit relating to military service provided by the Federal Government or a State or local government;
- (B) employment or professional advancement;
- (C) financial remuneration;
- (D) an effect on the outcome of a criminal or civil court proceeding; and
- (E) an impact on one’s personal credibility in a political campaign.¹⁴

This list places limits on the degree to which the government can restrict freedom of speech, but “includes” could be open to interpretation as to whether or not this list is exhaustive. This potential over-inclusiveness is problematic for narrow tailoring because it may inadvertently include benefits beyond those enumerated and raise the aforementioned concern of restrictions extending to ‘limitless times and settings.’ The list is also potentially under-inclusive because it could be interpreted to not

12. Military Service Integrity Act of 2012, S. 3372, 112th Cong. (2012); Stolen Valor Act of 2012, H.R. 1775, 112th Cong. (2012).

13. See Joshua J. Orewiler, *Stolen Valor and Freedom of Speech: An Analysis of How Federal Law Should Criminalize the Wearing of Unearned Military Awards*, 97 IOWA L. REV. 1811, 1814 (2012) (discussing how courts may have different interpretations of whether or not there is a violation of the Stolen Valor Act when an actor wears a military award in a movie).

14. S. 3372.

cover some important tangible benefits, a deficiency which defeats the statute's purpose. For example, one may lie about military service because of its potential to be counted as a plus factor in academic admissions. Admission to an institution of higher learning is one example of a tangible benefit that could be read to lay outside the statute's purview. Hence, lying about military service for improving one's admissions prospects should be included under this list because of the benefit's similarity to employment or professional advancement.¹⁵

Compared to the Senate bill, the House bill has a potentially more expansive definition of tangible benefit, which could be read to include tangible benefits like improved chances of admission. The House bill would make it a crime to lie about a military award in order to receive "money, property, or [some] other tangible benefit," leaving tangible benefit undefined.¹⁶ Again, this potential over-inclusiveness poses problems for narrow tailoring. Additionally, the House bill is more restrictive than the Senate bill in one important aspect. The House bill only addresses false representations about military decorations and medals¹⁷ while the Senate bill includes false representations about military decorations, medals, and military service.¹⁸ This aspect of the House bill is under-inclusive because it does not cover something that many veteran's take great pride in: their military service.

A combination of the two bills, one that includes military service as well as a specific and definitive list of tangible benefits, should be adopted because it would protect the tangible benefits owed to service members in a way that is constitutional. The original law had bipartisan support because it protected a sympathetic group, with the added benefit that enforcement of the law would be relatively cost-free for the government.¹⁹ It is likely

15. See UNIVERSITY OF MICHIGAN, 2012-2013 APPLICATION FOR FRESHMAN UNDERGRADUATE ADMISSIONS, at 7, available at <http://www.admissions.umich.edu/drupal/first-year-students> (providing the option for applicants to indicate veteran status along with racial and ethnic information). See generally *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) (permitting university admissions offices to consider race as a plus factor in an individualized holistic review of all the ways an applicant can add diversity).

16. H.R. 1775.

17. *Id.*

18. S. 3372.

19. Ramya Kasturi, Note, *Stolen Valor: A Historical Perspective on the Regulation of Military Uniform and Decorations*, 29 YALE J. ON REG. 419, 437-38 (2012).

that a combination of these two popular bills into a narrowly tailored law that includes an element of intent to state false claims in order to gain a tangible benefit would also gain bipartisan support in response to the *Alvarez* ruling.

Although both proposed bills were reactions to the Court's ruling and were attempts to save the Stolen Valor Act, neither seems to fully capture the original law's intent; the bills protect property but not intangible assets such as honor. Hence, in addition to the refined version proposed to ensure the bill's constitutionality, public action will be necessary to protect service members' honor. The best way to enforce the true spirit of the law would be through what the *Alvarez* plurality referred to as "counterspeech,"²⁰ where an informed public can outweigh misrepresentations by using the public's free speech, be it via the media or a simple protest, to expose any falsehoods; this counterspeech can be enabled by reference to an accurate national registry of all military personnel and awards. The Federal Government has argued that such a registry would be impractical and incomplete,²¹ but all the necessary pieces are in place for easy implementation. Every separating and retiring service member is given discharge paperwork that documents length of service as well as awards.²² This document is already required as proof for Veterans Affairs benefits and some government employment.²³ Additionally, some non-government entities, such as institutions of higher learning, already may request discharge documentation.²⁴ The creation of a registry does not mean that a service member should always be required to produce documentation containing a great deal of privileged information, but it is one mechanism by which the public can verify someone's claims and hold him or her accountable.

There are already ways to confirm someone's military service,

20. United States v. Alvarez, 132 S. Ct. 2537, 2549 (2012) (plurality opinion).

21. See *id.* at 2551.

22. See *Veterans Service Records*, NAT'L ARCHIVES, <http://www.archives.gov/veterans/military-service-records/> (last visited Nov. 14, 2012).

23. See, e.g., *Eligibility for the VA Home Loan Program*, U.S. DEPT OF VETERANS AFFAIRS (Apr. 6, 2012), <http://www.benefits.va.gov/homeloans/eligibility.asp>.

24. See, e.g., *\$1,000 Scholarship Available to any OIF/OEF Veteran/Military/Spouse!*, U-M STUDENT VETERANS ASSISTANCE PROGRAM, <http://vets.umich.edu/content/1000-scholarship-available-any-oifoef-veteranmilitaryspouse> (last visited Nov. 14, 2012).

especially when tangible benefits are involved, but if the Stolen Valor Act's goal is to protect soldiers' intangible valor by preventing those who did not serve from receiving benefits as if they did, then it will have to be the responsibility of an informed public to be vigilant. This dual reform—a revised statute and a national registry—will ensure both the Stolen Valor Act's constitutionality and the advancement of its principal goal. Indeed, regardless of whether or not the amendments are enacted or subsequently found to be unconstitutional, it should ultimately be a civic duty to uphold the values that the law attempts to protect.