Stolen Valor: A Historical Perspective on the Regulation of Military Uniform and Decorations

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This Note traces the roots of the Stolen Valor Act (SVA) to medieval sumptuary laws and laws regulating the use of heraldry. Like these historical laws, the SVA operates as a social ordering mechanism. Military uniforms and decorations are regulated because of their communicative value. The Note reveals the SVA’s function and the reasons for its passage by examining the evolution of laws governing military dress and the government’s defenses of such laws throughout the twentieth century. The SVA was passed in order to appease a politically sympathetic interest group, veterans, at little to no cost to the federal government. It ensures the government’s investment in its military labor force, protects public safety, and prevents the honor associated with military awards from being diluted or stolen.

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Introduction

"Should any who are not entitled to these honors have the insolence to assume the badges of them, they shall be severely punished."
George Washington, August 7, 1782

When Colorado Congressman John Salazar presented his bill criminalizing false claims of military heroism to Congress in 2005, he cited this pronouncement by the nation's first President as precedent for the legislation. When Colorado Congressman John Salazar presented his bill criminalizing false claims of military heroism to Congress in 2005, he cited this pronouncement by the nation's first President as precedent for the legislation.2 Military heroes have long captured the imagination and reverence of Americans because of the sacrifice, bravery, and courage associated with armed service. Both military uniforms and decorations have traditionally been recognized as symbols for such service. Beginning with Woodrow Wilson's creation of the military's first formal awards system in World War I, the wearing and use of military apparel and insignia by institutional outsiders have been heavily regulated through federal laws. These laws recognize the communicative value of a soldier's dress within the military and in society generally. They are a modern form of sumptuary laws—laws regulating patterns of consumption—used to perpetuate a specific social hierarchy and order.4

The Stolen Valor Act (SVA), however, differs from previous laws by adding a verbal speech element to the crime, and therefore implicating the First Amendment. The Ninth Circuit deemed the SVA an unconstitutional restraint on free speech in United States v. Alvarez, and the Supreme Court heard oral arguments concerning the Act's constitutionality on February 22, 2012. A new bill has been introduced in the House of Representatives limiting the SVA's application to false claims intended to result in personal gain (mimicking anti-

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2. Id.
fraud laws), but it is unclear if this would satisfy the most vehement proponents or opponents of the original SVA: proponents might argue that the bill does not go far enough, while opponents might argue that such a law is superfluous given existing anti-fraud laws. This Note does not seek to analyze the merits of the First Amendment claims, but instead to illuminate what is at stake in the battle over the SVA: why was the law passed? Who benefits from it? How does it operate and what function does it ultimately serve?

Though much of the rhetoric surrounding the passage of the SVA has involved the notion of fraud prevention, the true function of the Act is not primarily to protect the direct victims of fraud but rather to prevent, as the Act’s name suggests, stolen valor. The real victims of the misappropriation of military decorations are those who have rightfully earned the awards. These awards confer prestige and sympathy upon recipients; counterfeitters and impersonators create an illicit market that seeks to capture these honors. The SVA is an attempt to protect the excludability of a “club good” linked to a unique honorific entitlement. In this sense, the SVA and its predecessors closely resemble medieval European laws regulating the use of heraldry, or coats of arms.

From the earliest days of English heraldry in the thirteenth century and for centuries afterwards, alienation of heraldic insignia was limited to the hereditary line, with few legal exceptions. Monarchical governments had a strong interest in preserving a closely monitored system of heraldry in order to reward courage and skill in battle during times of both war and peace. The modern American government has a similar interest in strictly prescribing the

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7. Stolen Valor Act of 2011, H.R. 1775, 112th Cong. (2011). Though the bill has been referred to committee, it is unlikely that further action will be taken before the Supreme Court’s ruling in Alvarez.

8. Doug Sterner, a leading advocate of the SVA and founder of the HomeOfHeroes website, a database of military valor award citations, stated in an interview that anti-fraud laws are insufficient since often it is not apparent how military impostors are using impersonation for tangible personal gain. For this reason, he argues that the evidentiary burden for proving the fraud should be reduced to mere false claims. See Telephone Interview with Doug Sterner, Webmaster, HomeOfHeroes.com (Apr. 2, 2011) (transcript on file with author). But see Editorial, Stolen Valor, LAS VEGAS REV.-J., Apr. 4, 2011, http://www.lvrj.com/opinion/stolen-valor-119168464.html (“Fraud already is a crime. Carving out a special niche fraud for ‘stolen valor’ is redundant, superfluous and a huge waste of lawmakers’ time.”).

9. For a discussion of the meaning of “club good,” see infra Section IV.C.

10. It is worth noting that the speech elements of the SVA only concern military decorations. While uniforms are symbolic of service to the nation, their function is practical, helping in both signaling and coordination inside and outside of the military. Though not everyone may obtain a uniform, enough people may be entitled to possess one with minimal effort such that misappropriation by a third party does not significantly diminish the value of the good to its true owners. Decorations, however, reflect more than a commitment to protecting one’s country: they signify martial success and demonstrate a unique entitlement to honor. Decorations are therefore more suitably classified as club goods than are uniforms.


wearing and use of the awards it bestows upon distinguished veterans if it wishes to encourage brave service and respect for the armed forces. The SVA represents an attempt by the government to protect the reputation of those servicemen who have shown notable heroism in war. Viewed from this perspective, the SVA’s proper analogue is the law of defamation, not the law of fraud. As the SVA’s constitutionality continues to be litigated, the government will need to present a persuasive answer to the question of what compelling state interest is served by the law. Though an evaluation of the First Amendment implications of the Act is beyond the scope of this Note, I suggest that the government’s interest in the Act—the protection of an institutional investment in its awards system—has extensive historical roots.

Part I begins by exploring these roots, first in general sumptuary laws, then in heraldry regulations. Part II examines the sociological function of uniforms and proceeds to outline how and why the military in particular regulates the use of uniforms and decorations by insiders. It notes how insiders are socially conditioned to experience pride in military honor and shame in dishonor, and therefore are less in need of external regulations prohibiting misappropriation. Part III then cuts to the heart of the matter, describing the military’s regulation of outsiders. Section III.A provides historical background on the SVA, looking at foundational legislation from the World War I era and at subsequent amendments. Section III.B goes on to explain the impetus behind the passage of the SVA in 2006 from a political perspective, looking more broadly at Americans’ attitudes towards veterans since the Vietnam War. Since the Gulf War, veterans have seen an increase in political influence and popular respect. Though this influence has not resulted in significant tangible gains, it

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13. This is assuming that the relevant court finds the law to be content-based and therefore applies strict scrutiny. See, e.g., United States v. Strandlof, 746 F. Supp. 2d 1183 (D. Colo. 2010) (finding the SVA to be a content-based restriction on speech), rev’d, 667 F.3d 1146 (10th Cir. 2012); United States v. Perelman, 737 F. Supp. 2d 1221 (D. Nev. 2010) (also deeming the law to be a content-based restriction on speech). Some argue that false statements of fact, unless belonging to the category of “speech that matters,” fall outside of First Amendment protection and therefore laws limiting these statements are not subject to strict scrutiny. See United States v. Alvarez, 617 F.3d 1198, 1231 (9th Cir. 2010) (“[T]he better interpretation of the Supreme Court’s cases and those of our court is that false statements of fact—as a general category—fall outside of First Amendment protection except in certain contexts where such protection is necessary ‘to protect speech that matters.’”).


15. By tangible gains, I mean monetary gains. Unlike laws offering veterans greater benefits and payouts, the SVA is effectively costless to the federal government.
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has encouraged politicians to make symbolic gestures to bolster support among veterans and their allies. Part IV then examines the case law regarding the SVA and its predecessors in order to assess how the government has presented its interest in the Act in litigation and how courts have construed it. The legislative history of the SVA and conflicting interpretations of the legislative intent it represents frame the stakes for both the American government and veterans. This Note distinguishes between the symbolic role played by military uniforms and decorations and describes why the SVA, unlike previous legislation, only concerns the latter. Part IV also elaborates upon how the SVA fits into the broader category of the law of reputation. Finally, the Note concludes by examining what the future holds in store for the SVA, and by raising questions about how false claims differ from physical misappropriations of military paraphernalia. The body of law governing the use of these items reflects both typical American interests in national security, and distinctly European ideals related to the protection of honor.

I. Regulation of Appearances: Sumptuary Law and Heraldry

This Part traces the origins of the SVA to sumptuary and heraldry laws, thereby revealing some of the Act’s primary functions. Section A discusses the historical role of laws regulating the consumption of clothing and accessories in maintaining class divisions, expressing moral disapproval of unmerited ostentation, and announcing a stranger’s social rank. Section B then looks more specifically at the law of heraldry, identifying both the government’s interest in public safety and the promotion of honor among members of the military.

A. Sumptuary Laws

According to Erving Goffman, the world is but a stage, and through our non-verbal performances, we can control the response we receive from our audience. Social interactions involve a series of information games in which we glean clues about others through their conduct and appearance, while both intentionally and unintentionally projecting our own persona. We are all actors who assume fronts that project our social roles. Clothing is perhaps one of the most important and easily manipulated signals of social status. For

16. See ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959). Goffman defines “performance” as “all the activity of a given participant on a given occasion which serves to influence in any way any of the other participants.” Id. at 15.
17. Id. at 16.
18. Id.
19. See generally Mary Ellen Roach & Joanne Bubolz Eicher, Introduction to DRESS, ADORNMENT AND THE SOCIAL ORDER, supra note 4, at 3 (“[T]he portable character of clothing and associated decorative items make these highly visible and flexible in building the setting for behavior. Visually perceptible, they can, as a rule, be easily understood, more so than abstract, nonmaterial
centuries, governments around the world have recognized the communicative value of dress and have therefore imposed regulations to control how their citizens physically present themselves. In Ancient Rome, illustratively, emperors limited the mass use of certain luxury fabrics (such as silk) and certain colored dyes (such as purple) because of their association with royalty.

In England, sumptuary laws were used more generally to enforce class distinctions and to achieve related goals of controlling social order. Alan Hunt, a leading historian on sumptuary laws, argues in his "recognizability thesis" that these laws served a dual purpose: (1) to help strangers in a newly urbanizing country ascertain the rank of their neighbors and (2) to reinforce the hierarchical status claims of dominant classes in the face of efforts to encroach upon them. Though sumptuary laws govern conspicuous consumption generally, during the transition from feudalism to early modernity, their central target was dress. England began to repeal formal sumptuary laws in 1604, but the use of sumptuary codes continued in colonial America, where the class system was only beginning to develop.

In America, sumptuary laws were justified as a form of religious and moral regulation. In addition to reinforcing class distinctions, sumptuary laws were used to show condemnation of those spending beyond their means. In New England, in particular, the laws reflected Puritan values of austerity and hard work. For example, a 1651 Massachusetts law limiting the wearing of gold, silver, lace, and silk (among other items), decried "that intolerable excess and bravery have crept in . . . especially among people of mean condition, to elements, such as beliefs, sentiments, and norms. Even if the motives behind the use of visible things remain obscure, it is possible . . . to place some interpretation on this activity."

20. HUNT, supra note 4, at 1. Hunt describes how sumptuary laws have been employed in countries across the globe, including England, Japan, and Italy.


22. See AILEEN RIBEIRO, DRESS AND MORALITY 15 (2003). For descriptions of some of the other goals sumptuary laws aimed to achieve, see HAYWARD, supra note 21, at 17 (explaining that sumptuary laws suppressed luxury, which was associated with the sin of lust); and Hurlock, supra note 4, at 295-97 (describing how these laws could be used to encourage domestic trade and regulate the morality of citizens by preventing extravagant expenditures on material items).

23. HUNT, supra note 4, at 109 (1996); see also Hurlock, supra note 4, at 296 ("Sumptuary laws were used primarily to preserve class distinctions. When members of the nobility found their position of supremacy encroached upon by the lower classes who had attained wealth, they passed laws to restore the respect for the inequality of ranks which had previously existed.").

24. HUNT, supra note 4, at 29.


27. DOROTHY A. MAYS, WOMEN IN EARLY AMERICA: STRUGGLE, SURVIVAL, AND FREEDOM IN A NEW WORLD 384 (2004).
the dishonor of God." These sumptuary codes went largely unenforced and performed mostly an expressive role. After the Revolution, they all but ceased to exist as principles of liberty, and capitalism took hold. Future Supreme Court Associate Justice Rufus Wheeler Peckham articulated this new spirit of liberty while serving on the New York Court of Appeals: to uphold a law that turns on "the assumption that it tends to... prevent wastefulness or lack of proper thrift among the poorer classes... is to take a long step backwards and to favor that class of paternal legislation, which, when carried to this extent, interferes with the proper liberty of the citizen." Though sumptuary laws have been denounced as infringements upon personal liberty, clothing continues to hold symbolic capital, and for this reason regulations still target personal appearance through various mechanisms including intellectual property law, "saggy" pants laws, laws prohibiting cross-dressing, and a variety of other laws limiting freedom of dress.

The SVA itself does not control consumption, but the original statute it amended, 18 U.S.C. § 704, regulates the wearing, purchasing, and selling of military decorations. Similarly, 18 U.S.C. § 702 outlaws unauthorized wearing of military uniforms. The relevant statutes taken in their totality, therefore, are a modern form of sumptuary law. They reflect similar concerns for maintaining social order and expressing disapproval towards those who misrepresent their social status. Part IV further elaborates upon this point through a discussion of the functions of the SVA.

B. Heraldry

Perhaps more pertinent precedent for rules governing the use of uniforms and decorations comes from the law of arms—or heraldic law—designed to


29. HALL ET AL., supra note 26, at 47.


36. Id. § 702.
bestow honor and aid in identification. The precise origins of heraldry are disputed, but the first formal organizational system documenting ownership of various coats of arms in England appeared circa 1250. Beginning in about the tenth century, several European countries (including England, France, Italy, and Scotland) held tournaments to promote military prowess during times of peace. As knights began to sport heavy armor and helmets covering their faces, it became impossible to identify tournament participants, much less soldiers in war. As a result, knights began to use personal emblems placed on their shields to distinguish themselves from one another. These emblems came to be associated with specific families and conveyed a host of meanings to their viewers through a unique pictorial language. Each composition became the legal possession of its owner and was subject to laws of inheritance like other property but could not be otherwise alienated or transferred, with few exceptions. Generally one had rights to a coat of arms either by birth or by grant from a designated authority. By the second half of the fourteenth century, England’s Court of Chivalry oversaw heraldic disputes. Even today, certain jurisdictions, including England and Scotland, maintain laws prohibiting the unauthorized assumption of arms.

The United States has neither enacted prohibitions against armorial assumption, nor statutes protecting armorial bearings. After the Revolution, Americans sought to liberate themselves from what they saw as the excesses of the British monarchy. As a result, they rejected the aristocratic system of titles, privileges, and heraldry. By World War I, however, a wide range of symbols and colors comprising forms of military insignia proliferated in the United States. In an effort to develop a system of “clear communication and identification on the battlefield,” Woodrow Wilson created the Heraldic Program Office, under the War Department, to organize honors distributed by the Army. During World War II, the demand for military insignia across all

38. Id. at 52.
39. JENKINS, supra note 12, at 1.
40. Ashman, supra note 37, at 51-52.
41. JENKINS, supra note 12, at 3.
42. See BOUTELL & FOX-DAVIES, supra note 11, at 3.
43. Id.
44. Ashman, supra note 37, at 57-59.
45. Id. at 56.
47. Id.
branches of service increased, and consequently, the Office, renamed in 1960 as the Institute of Heraldry, soon began to provide heraldic services to the entire U.S. military. From a military perspective, these new rules were part of a grander scheme of protecting an investment: the honor of its labor force.

II. Regulation of Military Insiders

Part II explores the functions uniforms serve within the military. Section A describes the uniform’s role in fostering group identity, instilling discipline, easing coordination, and motivating courageous acts. Sections B and C then explain how uniforms simultaneously impose a duty and bestow a privilege upon members of the military. Because respect for uniforms is deeply engrained in the culture of the institution, in many ways there is less need for external discipline concerning misuse by military insiders than there is for outsiders. For insiders, being stripped of one’s uniform or accused of misappropriation is the ultimate dishonor. Section C ends with an anecdote that demonstrates the shaming power of these accusations.

A. Functions of the Uniform

The military is unique in that it is hierarchical but also tightly bound by feelings of group solidarity. Goffman refers the military as a “total institution,” which he defines “as a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life.” Goffman argues that total institutions seek to eliminate autonomy and self-determination by controlling both appearance and conduct. Admission into an institution such as the military requires soldiers to leave behind their personal possessions, adopt a uniform, and assume the military identity. The uniform plays an important role in enabling identification, establishing legitimacy, and enforcing social control.

50. History of the Institute of Heraldry, INST. OF HERALDRY, http://www.tioh.hqda.pentagon.mil/TIOH/TIOH_history.aspx (last visited Apr. 8, 2012). In 1957, the Secretary of the Army was authorized to provide these services to all branches of the government, including those beyond the armed forces. Id.
51. See infra Section III.C.
52. ERVING GOFFMAN, ASYLUMS, at xiii (1961).
53. Id. Other examples of total institutions are abbeys, monasteries, prisons, and mental hospitals. Id. at 5.
54. Id. at 41, 43.
55. Id. at 18-19.
Uniform codes may be seen as a modern outgrowth of sumptuary laws in that they differentiate individuals’ status and role in society. They separate members from non-members, and subordinate individual preferences in favor of organizational goals. For this reason, a uniformed person’s misbehavior is said to “disgrace the uniform,” as it is an emblem of the larger group. The existence of the uniform implies a group structure, and it therefore confers legitimacy upon its wearers, guaranteeing audiences that each individual is subject to the control of an organization and that dereliction of duty will result in deprivation of the organizational dress. As cultural historian Paul Fussell writes, “uniforms, even the most modest and apparently demeaning... tend to ennoble their wearers.” They are a distinctive mark of social status and of belonging to some entity. But within this entity, uniforms impose discipline through conformity and a rigid hierarchical order.

In Identity Economics, George Akerlof and Rachel Kranton describe how uniforms contribute to an identity model of workplace incentives. Upon entering the military academy, cadets are stripped of their former identities and taught to think of themselves as officers in the armed forces. Because it is logistically difficult and fiscally infeasible to ascribe monetary rewards to specific tasks performed well within the military, Akerlof and Kranton argue that instead employees may be induced to work hard through various intangibles tied to their work identity. In order to foster the attachment of individual employees to the organization as a whole, it is critical to separate insiders from outsiders. To do so, the military invests in making new members insiders through a host of mechanisms designed to create a common identity, such as initiation rites, haircuts, uniforms, and oaths of office. Insider status provides individuals with feelings of legitimacy and respect and therefore

57. CRAIK, supra note 56, at 14-16. Paul Fussell provides an example of how uniform codes resemble sumptuary laws in his discussion of gilt buttons—now used in military uniforms—which have acted as an aristocratic emblem ever since sixteenth century French King Francis I donned a suit decorated with 15,000 of these buttons. PAUL FUSSELL, UNIFORMS: WHY WE ARE WHAT WE WEAR 36-37 (2002).

58. Joseph & Alex, supra note 56, at 719; see also Lawrence Langner, Clothes and Government, in DRESS, ADORNMENT AND THE SOCIAL ORDER, supra note 4, at 124, 127 (“By wearing the uniform of a particular group, a man shows by his clothing that he has given up his right to act freely as an individual but must act in accordance with and under the limitations of the rules of his group.”).

59. Joseph & Alex, supra note 56, at 720.

60. Id. at 722-23.

61. FUSSELL, supra note 57, at 4-5.

62. CRAIK, supra note 56, at 22.


65. Id. at 46 (quoting General Ronald Fogelman, who described such intangibles as “the satisfaction gained from doing something significant with their lives; the pride in being part of a unique organization that lives by high standards; and the sense of accomplishment gained from defending our nation and its democratic way of life”).

66. Id. at 45.
motivates each member to remain in good standing. In order to protect the institutional investment made in distinguishing its members and fostering a strong sense of in-group identity, the government must maintain a credible system of conferring insider benefits.

To summarize, the regulation of uniforms and insignia within the military serves a variety of functions related to organizational goals. The military’s system of dress creates a group identity, allows for identification and coordination between and among insiders and outsiders, imposes discipline and hierarchy, and fosters the institutional allegiance of members. For these reasons, the government has maintained a strict code of internal rules regarding the wear and use of military apparel. Each division of the armed forces maintains a handbook of regulations on the appropriate wear and appearance of uniforms and insignia. The regulations are updated frequently to accommodate changes and are extraordinarily detailed. For example, the Army regulations dictate rules on facial hair, haircuts, fingernails, jewelry, and glasses. They designate different attire for different climates and activities. They also include pictures displaying how uniforms and insignia are to be properly worn.

More generally, the Uniform Code of Military Justice—applicable to all members of the uniformed services of the United States—contains two chapters

67. See, e.g., U.S. ARMY SERV. FORCES, POCKET GUIDE OF UNIFORM INSIGNIA: UNITED STATES, BRITISH EMPIRE, U.S.S.R., FRANCE, CHINA, POLAND (1943). This guide, given to service members during World War II, allowed for coordination between soldiers by showing the ranks of officers of various countries’ armies in the allied forces. Id. More recently, the importance of uniforms has been highlighted in the war on terror since under the Third Geneva Convention, unlawful combatants who, among other things, do not display proper insignia are not entitled to prisoner of war protections. See Thom Shanker & Katharine Q. Seelye, Word for Word: The Geneva Conventions; Who Is a Prisoner of War? You Could Look It Up. Maybe., N.Y. TIMES, Mar. 10, 2002, http://www.nytimes.com/2002/03/10/weekinreview/word-for-word-geneva-conventions-who-prisoner-war-you-could-look-it-up-maybe.html (noting that Al Qaeda members may not “fit the definitions in the [Geneva C]onventions”, including the possession of “a fixed distinctive sign recognizable at a distance,” that would entitle them to POW status).

68. See, e.g., U.S. DEP’T OF THE ARMY, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (2005) (outlining, in extensive detail, how and when various elements of the uniform should be worn for members of the Army).

69. United States government regulation of military uniforms predates the Civil War. See, e.g., U.S. MARINE CORPS, REGULATIONS FOR THE UNIFORM & DRESS OF THE MARINE CORPS OF THE UNITED STATES (Philadelphia, Charles Desilver 1859) (providing detailed pictures on how to wear various uniform components). Guides describing and depicting appropriate military apparel wear have been updated frequently throughout history. See, e.g., U.S. DEP’T OF THE ARMY, UNIFORM AND INSIGNIA: FEMALE PERSONNEL (1975); U.S. WAR DEP’T, REGULATIONS AND DECISIONS PERTAINING TO THE UNIFORM OF THE ARMY OF THE UNITED STATES (Washington, D.C., Government Printing Office 1897). These guides have consistently provided a high level of detail regarding a soldier’s personal appearance. See, e.g., U.S. WAR DEP’T, supra, at 5 (stating that officers must wear “[a] double-breasted frock coat of dark-blue cloth, the skirt to extend from one-half to three-fourths the distance from the hip joint to the bend of the knee”).

70. See, e.g., U.S. DEP’T OF THE ARMY, supra note 68, at 1-10 (outlining the rules governing personal appearance including the proper haircut, jewelry, and eyewear for a soldier).

71. See, e.g., id. at 13-17.

72. See, e.g., id. figs. 1-30.
specifically pertaining to the use of uniforms, decorations, and awards. These laws describe when and who may wear uniforms and decorations, rather than how they should be worn.

B. Uniformity as a Duty

Servicemen have a duty to respect the rules the military sets forth, superseding other rights they may have as free citizens of the United States. For example, military rules infringing upon First Amendment rights are reviewed under a more deferential standard than strict scrutiny because, as Justice Rehnquist held in *Goldman v. Weinberger*, "the military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." In *Goldman*, the petitioner's claim that an Air Force regulation preventing him from wearing a yarmulke violated the Free Exercise Clause of the First Amendment was denied. Justice Rehnquist elaborated upon the purpose of the system of uniforms: "the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank." Beyond fostering group solidarity and discipline, uniforms serve utility functions in safety and coordination. In *Sherwood v. Brown*, the Ninth Circuit upheld as constitutional a Navy uniform regulation requiring a Sikh sailor to forego the wearing of a turban to accommodate the wearing of a helmet because of the necessary physical protection provided by the headgear. In *United States v. Armon*, the U.S. Court of Appeals for the Armed Forces found a staff sergeant guilty of wrongfully wearing certain military accouterments (among other counts), citing the coordination and morale problems created by
his behavior: "appellant’s ‘imaginary qualifications’ caused his chain of command to give him dangerous duties that he was not qualified to perform." Military insignia not only inform a soldier’s team of his position and skill level, but also send a message to the general public regarding whose authority they may trust. For this reason, courts have condemned use of such insignia in improper contexts.

The military’s attempts to impose discipline and project authority through a strict dress code most recently resulted in controversy in a case involving an effort to require “dual status” Air Reserve Technicians to wear their uniforms while serving in a civilian capacity. The plaintiffs asserted that the rule is arbitrary and capricious. On the other hand, the defendants claimed that the regulation is reasonable because it creates combat readiness and builds “esprit de corps,” and that, irrespective of its reasonableness, the regulation is a political issue that is inappropriate for judicial review. The D.C. District Court dismissed the case for lack of subject matter jurisdiction due to the plaintiffs’ failure to exhaust administrative remedies.

C. Uniformity as a Privilege

Use of military uniforms and decorations is considered not only a duty, but also a privilege and an honor. Servicemen may sometimes protest regulations regarding military apparel, but quite often they fight to retain their right to use their uniforms. Indeed, denial of this right is used as a shaming mechanism by supervising authorities. In military courts, defendants frequently assert a due process violation when they are not allowed to wear
their preferred uniform. Since its modern inception, the Manual for Courts-Martial (MCM) has stated that “[a]n accused officer, warrant officer, or enlisted person will wear the insignia of his rank or grade and may wear any decorations, emblems, or ribbons to which he is entitled.”

As explained in United States v. Taylor, “[t]his presumption [of a right to wear one’s uniform and decorations] contemplates that nothing is more inflammatory to an officer of the military than to see a member of his service ‘out of uniform’ or wearing a soiled or ill-fitting uniform.”

The MCM states that the president of the court-martial proceeding “prescribes the uniform to be worn.” Judges have voiced disagreement, however, on whether it is the responsibility of the president or of the defense counsel to assure that the defendant is wearing the proper uniform and insignia during the trial. And even when the defendant has not been permitted to wear the correct attire during a trial, judges often find no prejudicial result. Indeed, some judges have distinguished awards associated with armed combat from other honors and have particularly emphasized the singular significance of decorations associated with Vietnam service. In United States v. Demerse, the

86. See, e.g., United States v. Demerse, 37 M.J. 488 (C.M.A. 1993) (holding that the staff judge advocate’s failure to note the defendant’s Vietnam awards and decorations in his recommendation to the convening authority constituted “plain error” requiring defendant’s sentence to be set aside); United States v. Cauthen, ARMY 9801025, 2000 WL 35801778, at *2 (A. Ct. Crim. App. Feb. 15, 2000) (rejecting an ineffective assistance of counsel claim by the defendant who said he had not been allowed to wear his full complement of medals at trial); United States v. Leslie, 49 M.J. 517 (N-M Ct. Crim. App. 1998) (finding error but no prejudice from the staff judge advocate’s failure to note the defendant’s combat infantryman badge in his recommendation); United States v. Taylor, 31 M.J. 905 (A.F.C.M.R. 1990) (holding that the defendant had not been deprived of a fair trial when he appeared at trial without prescribed uniform service dress coat); United States v. Daggett, 34 C.M.R. 706 (N.B.R. 1964) (denying substantive due process violation claim on behalf of the defendant who was tried in dungarees without any objection); United States v. Scales, 32 C.M.R. 614, 618 (A.B.R. 1962) (holding no prejudice resulted from requiring the defendant to wear fatigue uniform where such uniform was “habitually worn at courts-martial by all participants”); Hlivka, 17 C.M.R. at 491 (finding no prejudice where the defendant appeared at trial in a uniform shorn of all decorations).

87. The 1951 MCM was the first manual to be drafted by a committee representing all three services, and was the first manual to be issued under the 1950 Uniform Code of Military Justice. Military Legal Resources: Manuals for Courts-Martial, LIBRARY OF CONG., http://www.loc.gov/rr/frd/Military_Law/CM-manuals.html (last visited Apr. 8, 2012).

88. MANUAL FOR COURTS-MARTIAL UNITED STATES ¶ 60 (1951).

89. 31 M.J. 905, 906 (A.F.C.M.R. 1990).

90. MANUAL FOR COURTS-MARTIAL UNITED STATES, supra note 88, ¶ 40(a).

91. In United States v. Taylor, the court held that defense counsel was responsible for ensuring that the defendant was appropriately dressed. 31 M.J. 905 (A.F.C.M.R. 1990). In United States v. Hlivka, the court held that the judge had this responsibility. 17 C.M.R. 490 (N.B.R. 1954).

92. See, e.g., Daggett, 34 C.M.R. 706, 706 (N.B.R. 1964) (finding no prejudice even though Navy servicemember was tried in dungarees); United States v. Thomas, 39 M.J. 1078 (C.G.C.M.R. 1994) (holding that there was no plain error in staff judge advocate omitting mention of awards in recommendation to convening authority where awards were unrelated to armed conflict).

93. In Thomas, the defendant’s service record, composed by the staff judge advocate, was missing certain medals and awards that the defendant had earned. 39 M.J. at 1081. The court stated that only if the omitted awards were earned in armed combat would prejudice be assumed. Id. at 1082; see also United States v. Troha, No. NMC 95 02200, 1996 WL 928185, at *2 (N.M. Ct. Crim. App. June 28, 1996) (distinguishing Demerse as only applying to awards for armed combat).
staff judge advocate failed to note the defendant’s Vietnam decorations in his recommendation to the convening authority. Defense counsel also failed to “enumerate [the defendant’s] awards and decorations.” Nonetheless, the Court of Military Appeals held that the staff judge advocate’s omission constituted plain error. Citing appellate defense counsel’s reply brief, the court stated:

Service in Vietnam carries special distinction. Such service is even more noteworthy today, some 20 years after the cessation of hostilities in Vietnam, as it is becoming increasingly rare to find servicemembers on active duty with Vietnam service. Awards received as a result of Vietnam service are likewise viewed as important statements about a soldier’s or sailor’s character.

The deference shown in Demerse for Vietnam service is unique and has not been interpreted to apply broadly to all omitted military awards. In United States v. Thomas, the judge distinguished Demerse by stating, “[c]ertainly the language of the opinion appears to focus entirely on the importance of Vietnam service and . . . the Court has indicated that Demerse does not have unlimited applicability.” Plain error is now only found in staff judge advocates’ reports for omissions relating to awards for armed combat.

The entitlement to wear and be associated with military insignia is of utmost importance to members of the military. In so far as a soldier’s identity largely revolves around his group affiliations, his self-worth is tied to symbols reflecting such relationships. A tragic incident reflecting the value of these symbols occurred in 1996 when Chief of Naval Operations, Admiral Jeremy Michael Boorda, took his own life after Newsweek magazine raised questions about the legitimacy of his wearing a “V” for valor medal on his combat ribbon from Vietnam. In a suicide note addressed to other sailors, Admiral Boorda described his actions as “an honest mistake” and voiced concern over how he would be viewed by the fleet and by the media. Two years later, Admiral Boorda received partial vindication when the former Chief of Naval Operations, Admiral Elmo R. Zumwalt, Jr., declared in a letter, which was entered into Admiral Boorda’s official record, that he had in fact been eligible to wear the disputed decorations for service aboard two warships during the

95. Id. at 490.
96. Id. at 492.
97. Id. at 493 (citation omitted).
Vietnam War. Unfortunately, Admiral Boorda had been too overcome by shame and dishonor in the unjustified assault on his identity years earlier.

Admiral Boorda's suicide is emblematic of the value military members attach to material items identifying them for their service. Donning the uniform may start as a duty, but it becomes a privilege and an honor.

III. Regulation of Military Outsiders

Because of both the functional and symbolic importance of a strict system regulating the use of military uniforms and decorations, the United States government has extended regulations to civil society. When the National Defense Act was passed in 1916, Congress formally created a section titled, "Protection of the Uniform." The law stated:

It shall be unlawful for any person not an officer or enlisted man of the United States Army, Navy, or Marine Corps, to wear the duly prescribed uniform of the United States Army, Navy, or Marine Corps, or any distinctive part of such uniform, or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army, Navy, or Marine Corps.

Further amendments to the Act also criminalized the unauthorized wearing, manufacture, and sale of medals and badges including, but not limited to, the Congressional Medal of Honor, the Distinguished Service Cross, the Distinguished Service Medal, and the Distinguished Flying Cross. Today, the U.S. Code contains four sections governing the use of military attire. Together, they prohibit a range of unauthorized activities, including the following:

1. The manufacture, sale, and possession of military insignia or identification cards;
2. The wearing of the uniform of any of the armed forces.

104. Id.
106. See 18 U.S.C. § 701 (2006) (penalizing the unauthorized manufacture, sale, and possession of certain official badges, identification cards, and other insignia); id. § 702 (criminalizing the unauthorized wear of a uniform of the armed services or of the Public Health Service); id. § 703 (disallowing the unauthorized wear with intent to deceive of a uniform of a friendly nation); id. § 704 (criminalizing the unauthorized sale, wear, purchase and false claims involving military honors; enhancing penalties for such actions pertaining to the Congressional Medal of Honor, the Distinguished Service Cross, the Navy Cross, the Air Force Cross, the Silver Star, and the Purple Heart).
107. Id. § 701.
108. Id. § 702.
3. The wearing of foreign government uniforms with intent to deceive;\footnote{109} and
4. The wearing, purchase, transport, manufacture, sale, and trade of military decorations/medals.\footnote{110}

Penalties for such offenses range from fines to a year of imprisonment.\footnote{111} In 2006, the law was amended through the SVA to criminalize false claims regarding the receipt of certain particularly prestigious military awards including the Congressional Medal of Honor and the Purple Heart.\footnote{112} This recent amendment, which received unanimous consent in the Senate and was subject to a voice vote in the House,\footnote{113} has nevertheless sparked controversy. By criminalizing speech, the SVA implicates the First Amendment more directly than any of the previous regulations of expression.

The public attention brought to the law by civil libertarians has stirred debate beyond the constitutional issues at stake. Debate has focused on two key questions. First, why, several decades after the last amendment to these sections of the United States Code, have politicians mobilized to expand the acts criminalized under the law? Second, what motivated the concerned constituencies to add a speech element to the existing law? Why only apply this amendment to claims involving decorations rather than also apply it to claims involving uniforms? The answers to these questions are multifaceted and complex, but the following Sections seek to provide a partial explanation.

A. Veterans and Their Political Influence in the Late Twentieth Century

The reception that a veteran receives in the aftermath of a war is influenced by an array of factors, including the popularity of the war, its duration, and the strength of the economy upon the war’s end. American involvement in World War II, for example, received broad popular support and ended in the midst of a domestic economic boom. Unsurprisingly, returning veterans received a warm public welcome and direct government support through legislation to aid them in their readjustment to civilian life.\footnote{114} Vietnam veterans, on the other hand, received a markedly lukewarm reception upon their return. Vietnam was not only an overwhelmingly unpopular war but also the

\footnotesize{109. Id. § 703.}
\footnotesize{110. Id. § 704. The statute also criminalizes attempts at these activities, whether or not successful. Id.}
\footnotesize{111. See 18 U.S.C. §§ 701-704 (2006). Only Sections 704(c) and 704(d) impose punishments of up to a year of imprisonment; all other sections impose a maximum of six months.}
\footnotesize{112. See id. § 704(c).}
\footnotesize{114. JOSEFINA J. CARD, LIVES AFTER VIETNAM: THE PERSONAL IMPACT OF MILITARY SERVICE 2 (1983). Note that I have omitted discussion of the conflict in Korea because it was much briefer than the Vietnam War and garnered neither strong support nor opposition. Veterans in this instance also returned to a fairly healthy economy. Id.}
longest-lasting in American history at that time. Vietnam-era soldiers returned from a failed war to an economy in recession and a war-weary society.\textsuperscript{115}

The traditional story told regarding how veterans were treated upon their return from Vietnam says that they were shamed into hiding by a disapproving public.\textsuperscript{116} Indeed, when the Vietnam Veterans Memorial in Washington D.C. was opened in 1982, \textit{Time} magazine published an article under the headline, "A Homecoming at Last," noting that "[u]ntil recently, acknowledging Viet Nam veterans in such showy fashion would have connoted approval of the nightmarish war."\textsuperscript{117} Today, some historians question the origins of the narrative surrounding hostile homecomings for veterans. Jerry Lembcke, for example, argues that the cultural myth of the "spat-upon" Vietnam veteran was later revived and exploited to bolster American support for the Gulf War. Congress and the press made the treatment of soldiers a primary focus of the Gulf War, chastising the public for their abysmal reception of returning Vietnam soldiers.\textsuperscript{118}

Regardless of whether the level of tension between the American public and Vietnam veterans has grown more pronounced in memory, there is no dispute that by comparison, Americans embraced Gulf War veterans. Doug Sterner, a leading proponent of the SVA and Vietnam veteran,\textsuperscript{119} stated in an interview that the Gulf War significantly boosted the reputation of the military and of veterans generally in American society. He explained:

\begin{quote}
[i]there was a lot of impersonation that went on up till the beginning of the Vietnam War. We heralded our heroes in World War II. We made movies about them up through the Korean
\end{quote}

\begin{footnotes}
\item[115] \textit{id}. at 2-3.
\item[116] For example, veteran Bernard Burkett, in his book, \textit{Stolen Valor}, describes how a waitress refused to serve him and how fellow passengers harassed him on his flight home. \textsc{Bernard Gary Burkett \& Glenna Whitley, Stolen Valor: How the Vietnam Generation Was Robbed of Its Heroes and Its History,} at xxiii-xxiv (1998); \textit{see also id.} at xxiv ("None of the other passengers defended me. I felt like a pariah. If I had been a veteran of World War II, coming home after serving my country, somebody would have slugged the [harassers].").
\item[117] \textsc{Kurt Andersen \& Jay Branegan, A Homecoming at Last, TIME,} Nov. 22, 1982, http://www.time.com/time/magazine/article/0,9171,955025,00.html; \textit{see also Norma Wikler, Hidden Injuries of War, in Strangers at Home: Vietnam Veterans Since the War} 103, 103-04 (Charles R. Figley \& Seymour Leventman eds., 1980) ("Once in the United States they discovered that they had become the visible symbols of this unpopular and unvictorious war. Many found their status of 'veteran' a stigma rather than a source of pride.").
\item[118] \textit{See Jerry Lembcke, The Spitting Image: Myth, Memory, and the Legacy of Vietnam} 20-21 (2000). Lembcke cites a \textit{New York Times} article from September 16, 1990 in which Congressmen framed the Gulf War in comparison to Vietnam. \textit{Id.} He describes how the story was accompanied by pictures of Senators John Kerry and John McCain from their days in Vietnam, and how it quoted Representative John Murtha as stating, "The aura of Vietnam hangs over these kids . . . . Their parents were in it. They've seen all the movies. They worry, they wonder." \textit{Id.} at 21; \textit{see also Eric T. Dean, Jr., Shook Over Hell: Post-Traumatic Stress, Vietnam, and the Civil War} 208 (1997) (arguing that Vietnam veterans were treated as well as soldiers returning from other wars throughout American history and that the only unusual aspect of their experience is "the development of this actual or imagined hostility and bitterness . . . even in the face of World War II-type readjustment benefits"); \textsc{H. Bruce Franklin, Vietnam and Other American Fantasies} 62 (2001) ("The spat-upon veteran then became a mythic figure used to build support for military fervor and, later on, the Gulf War . . . .").
\item[119] \textit{See supra} note 8.
\end{footnotes}
War into the Vietnam War. And then during the Vietnam War because of the bad taste it left in people's mouths, from 1968 on if you were a combat veteran, especially in the Vietnam War, you didn't talk about it very much because it was not cool to be a Vietnam veteran. But then we had the Gulf War and I think American society responded to the Gulf War... perhaps out of some sense of guilt for how they treated the Vietnam veterans, and our military became much more highly esteemed. ... [It] became stylish to be a veteran. ... [We] learned a lesson from Vietnam that even though we oppose a war, we support the men and women in uniform... 120

Though veterans, limited by their relatively small numbers and modest lobbying power, have not been able to use their newly acquired political clout to successfully attain all of the monetary and healthcare-related benefits they may desire,121 they remain highly sympathetic public figures. As Richard Strandlof, who was recently convicted under the SVA, stated in response to a question about why politicians were drawn to him before uncovering his true identity, "the veterans population has validity that others don't." 122

B. Interest Group Power

For politicians, passing the SVA was a costless way to meet the demands of a publicly favored interest group. As Mancur Olson argues in his well-known theory on collective action, small organizations unified by a particular ideology are ideally suited to attain collective goods, particularly when each member stands to bear the costs and share the benefits equally. Larger groups face the problem of the "free rider" and of diluted incentives to act. As a result, democracies do not necessarily face the danger of a tyranny of the majority.123

120. Telephone Interview with Doug Sterner, supra note 8. Sterner believes that fervor over the Gulf War and guilt over Vietnam actually caused military impersonations of Vietnam veterans to spike. Though unable to confirm his suspicions through formal documentation, Sterner stated that he has heard that the number of people reporting themselves to be veterans of the Vietnam War has curiously increased in the census statistics of the past few decades. Id; see also Pam Belluck, On a Sworn Mission, Seeking Pretenders to Military Heroism, N.Y. TIMES, Aug. 19, 2001, http://www.nytimes.com/2001/08/19/us/on-a-sworn-mission-seeking-pretenders-to-military-h heroism.html ("[T]here is a growing eagerness of people to associate themselves with Vietnam, whether they were there or not. The war's image has undergone an overhaul as time has soothed society's bitterness, as movies and television have depicted Vietnam veterans as sympathetic victims or admirable warriors, and as politicians and business leaders with solid Vietnam records have become models of success and dignity.").


123. See generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971) (describing in detail Olson's theory of why some groups fail and others succeed in achieving their goals); see also RUSSELL HARDIN, COLLECTIVE ACTION 20-22 (1982) (providing a brief synopsis of Olson's argument). Olson's theory explains why heraldic law has outlived
Olson specifically points out the political power of veterans’ organizations by describing how they operate:

Their main functions are social, and they attract most of their members because of the social benefits they provide. . . . [They] are, in general, open only to members and their guests. The veteran gets not only the physical facilities of a club, but also comradeship and recognition for his wartime service. . . . All of these social and other benefits go only to those who join: they provide selective incentives. . . . The political power of the veterans’ lobbies is accordingly a by-product of the social and economic services by the veterans’ organizations.124

For this reason, when veterans united to demand the passage of the SVA, they offered politicians an easy way to garner their support. The SVA is largely self-enforced by veteran watchdogs,125 so the law is relatively cost-free for the government.

IV. Justifications for the Stolen Valor Act

Understanding why the SVA was palatable to politicians begs the question of why veterans demanded the passage of the bill in the first place. The function of the law may be examined from both the perspective of former service members and the perspective of the military as an institution. The purpose of the SVA should be considered alongside its predecessors, since it was motivated by many of the same factors. A few features do distinguish it, such as the addition of the speech element and the exclusive focus on decorations, rather than uniforms. The following Sections discuss the key intentions behind the overall regulation of the use of military attire and accessories by institutional outsiders.

A. Maintaining the Military’s Social Standing

The provisions of the U.S. Code concerning military emblems and insignia were at least in part designed to promote the dignity associated with the armed services. Originally the law stated that even if military insignia were used in a theatrical production, such use was illegal if the overall performance discredited the military. The Supreme Court found this to be an unconstitutional violation of the First Amendment in Schacht v. United States, where it considered the use of an Army uniform in a skit protesting the

sumptuary law; while sumptuary laws govern society generally, heraldic law serves the interests of a tight-knit minority group—the military.

124. OLSON, supra note 123, at 159 n.90.
Vietnam War. Nonetheless, the conviction of Schacht’s protesting companion, Smith, was upheld since he had not engaged in any part of the skit but had donned an unearned uniform. The Fifth Circuit ironically held:

We cannot say that the unauthorized wearing of a military uniform is on the same plane as the wearing of an armband. It does not constitute a ‘symbolic act’ akin to ‘pure speech.’ The statute we are reviewing was narrowly drawn to prohibit certain conduct that infringes a substantial national interest in maintaining the dignity of the armed forces.

Because Smith was decided before Schacht, the court essentially made the argument that though demonstrating against the military was normally perfectly legal, wearing the uniform while doing so was not, even though this could not be considered a “symbolic act.” On some level, the court’s outward denial of symbolism was misleading, as its analysis seemed to turn on the inherent significance of the military uniform as a representation of the organization as a whole.

B. Protecting Public Safety and Preventing Fraud

Much of the rhetoric surrounding the SVA has revolved around the goal of protecting the public from fraudulent acts. Doug Sterner has been engaged in uncovering military impersonators for several years, and has worked with his wife, Pam, to lobby for passage of the SVA. He has asserted that, in Stolen Valor cases, “there is invariably some type of associated fraud.” In an interview, he explained that the SVA was primarily intended to close a loophole in existing law by lowering the evidentiary burden to mere claims of unearned military honors rather than actual possession or wearing. With this

127. Smith, 414 F.2d at 635-36.
130. Telephone Interview with Doug Sterner, supra note 8.
131. Id. (“Virtually every act engaged in under the Stolen Valor Act had some fraud element. In many of the cases that were never charged, people don’t see the fraud but we hear about it afterwards. I heard about a case where a man was supposed to be the grand marshal of a Fourth of July or Memorial Day Parade out in Reno. He claimed to be a Navy Cross recipient, but I jumped on that and put a halt to it—the guy was a total phony. Two weeks later I got an email from somebody in Nevada thanking me for outing this guy. They said, ‘a year ago he was living in our community and telling everyone that he was being deployed to Iraq and we all raised money to help him out; we even went with him to the airport, and when we got there he said he was going to buy tickets and then he didn’t go.’ This was
understanding of the SVA and its predecessors, the victim of the crime is the person who is subjected to the fraud. It is unclear, then, why the SVA did not follow the model set by existing fraud laws, and why existing laws were insufficient to prosecute the acts criminalized under the statute.

Both state and federal laws condemn impersonation and fraudulent activity, including 18 U.S.C. § 912, which specifically criminalizes impersonation of a federal officer or employee:

Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.\(^{132}\)

The law requires more than the mere pretense of a false identity; it also requires that the person committing an act show intent to gain some "thing of value" from the impersonation. Similarly, most state laws on impersonation of government officers require some showing of intent to deceive.\(^{133}\)

As it stands, the SVA requires proof of neither scienter nor actual or attempted reliance or harm. In these respects, the SVA is distinct from traditional fraud laws. Though a number of SVA cases (and cases prosecuted under related laws) have involved fraudulent acts,\(^{134}\) several have not.\(^{135}\) For

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\(^{132}\) 18 U.S.C. § 912 (2006). The U.S. Code also contains provisions criminalizing impersonation of citizens of the United States; creditors of the United States; foreign diplomats, consuls or officers; Red Cross members or agents; 4-H Club members or agents; and persons authorized to make arrests or searches. See id. §§ 911-917.

\(^{133}\) See, e.g., CAL PEN. CODE § 538(d) (West 2011) (requiring fraudulent intent in impersonation of a peace officer); N.Y. PEN. LAW § 190.26 (Consol. 2011) (requiring intent to induce another to submit to the false authority being asserted or to rely on it in impersonation of police officers or federal enforcement officers); OHIO REV. CODE ANN. § 2921.51 (West 2011) (requiring intent to deceive in impersonation of law enforcement personnel); S.C. CODE ANN. § 16-13-290 (2010) (requiring intent to secure property in offense for impersonation of an officer).

\(^{134}\) In United States v. Iannone, the defendant defrauded a Vietnam War veteran by claiming to be a fellow veteran and winner of a Purple Heart, Silver Star, and Congressional Medal of Honor. 184 F.3d 214 (3d Cir. 1999). In holding the defendant accountable for fraudulently inducing investments which he used for his personal expenses, the court ruled that because the defendant preyed upon a vulnerable victim, he should face a heightened sentence. Id. at 220; see also United States v. Swisher, 360 Fed. Appx. 784 (9th Cir. 2009) (convicting the defendant for unauthorized wearing of medals and false statements in attempt to defraud Department of Veterans Affairs for benefits); United States v. Spencer, 18 Fed. Appx. 734 (10th Cir. 2001) (finding the defendant guilty of forging a seal of the Navy and wearing of military decorations without authorization in an attempt to defraud his wife and stop her from divorcing him); United States v. Alexander, 421 F.2d 669 (5th Cir. 1970) (finding the defendant guilty of unauthorized use of a Navy uniform while engaging in vehicle theft); Dalton v. Hunter, 174 F.2d 633 (10th Cir. 1949) (finding an unlawful wearing of a uniform in connection with a sex trafficking scheme); United States v. Farkash, 952 F. Supp. 696 (D. Colo. 1996) (finding the defendant not guilty in an alleged unlawful wearing of government identification to gain access to secured area).

\(^{135}\) See, e.g., Gaston v. United States, 143 F.2d 10 (D.C. Cir. 1944) (finding the defendant guilty of unauthorized wearing of uniform, even though the defendant's actions were unintentional and the defendant had no intent to deceive); United States v. Krakower, 86 F.2d 111, 112 (2d Cir. 1936) (stating that as long as defendant knew he was wearing a uniform that he had not earned, no further...
example, in *Gaston v. United States*, a former Captain of the New York State Guard wore his old uniform to an event at the National Press Club, thinking that he was authorized to do so. The D.C. Circuit held that the relevant section of the National Defense Act did not contain a scienter requirement and that therefore the defendant should be found guilty. *Gaston* was decided in 1944 and involved a prosecution for wearing an unauthorized uniform rather than for verbal false claims regarding ownership of the uniform. Since then, the government has taken a different position towards the question of whether or not intent to deceive is required, at least with respect to verbal speech.

In May 2011, Republican Congressman Joe Heck of Nevada proposed to add language to the SVA to make it an offense for anyone who, "with intent to obtain anything of value, knowingly makes a misrepresentation regarding his or her military service." Generally, courts—engaging in constitutional avoidance—have shown willingness to read a scienter requirement into the law, without demanding any amendments to the existing statute. They disagree, however, on whether it is necessary for the law to require proof of actual harm in order pass constitutional muster. In *United States v. Strandlof*, a Colorado District Court held:

The principal difficulty I perceive in trying to shoehorn the Stolen Valor Act into the First Amendment fraud exception is that the Act, although addressing potentially fraudulent statements, does not further require that anyone have been actually mislead, defrauded, or deceived by such misrepresentations.

The Tenth Circuit subsequently overturned this decision, pointing to numerous federal and state laws restricting false speech even in the absence of proof of concrete harm or direct injury. Conversely, the Ninth Circuit, in deeming the SVA unconstitutional, held that the presumptive reputational harm

proof of intent to deceive was necessary, as "it was not essential to show that he did so to gamble at the post, or to do anything else"); *United States v. Herting*, 48 F. Supp. 607 (S.D. Fla. 1943) (finding the defendant guilty of misuse of an Army uniform without establishing malicious intent).

137. *Id.*
138. *Id.* at 10.
140. See *United States v. Strandlof*, 667 F.3d 1146, 1154-55 (10th Cir. 2012) ("The Supreme Court requires we read an act of Congress narrowly, so as to avoid constitutional problems. . . . Accordingly, we find the Act is limited in two important ways. . . . First, the term 'falsely represents,' as used in § 704(b), connotes that to be guilty, a speaker must have had a specific intent to deceive."); *United States v. Alvarez*, 617 F.3d 1198, 1209 (9th Cir. 2010), cert. granted, 132 S. Ct. 457 (2011) ("If a scienter requirement would save the statute, we would be obliged to read it in if possible. . . . But that is not enough. The Court has never held that a person can be liable for defamation merely for spreading knowingly false statements. The speech must also be 'injurious to a private individual.' " (internal citations omitted)).

141. 746 F. Supp. 2d 1183, 1188 (D. Colo. 2010), rev'd, 667 F.3d 1146 (10th Cir. 2012).
asserted by the government was insufficient to show injury.143 The court analyzed the SVA under the law of defamation and the law of fraud, two classes of speech typically unprotected by the First Amendment. The majority stated, “[T]here is no readily apparent reason for assuming, without specific proof, that the reputation and meaning of military decorations is harmed every time someone lies about having received one.”144 It highlighted that the SVA, unlike typical defamation laws, does not require a showing of publicity or of a victim.145 Additionally, unlike fraud laws, the Act does not require the showing of a “bona fide harm”146—the prosecution need not prove that anyone was actually misled by the false statement, or that there was a material harm.147

On a practical level, requiring proof of intent to deceive or of bona fide harm could endanger the public because of the communicative significance of military uniforms and decorations. As argued in Section II.A, the wearing of a uniform or decoration could be considered a deception in and of itself because of the authority these symbols command. For example, in United States v. Frisbie, an enlisted airman found wearing the uniform of a commissioned officer at a mall in Elmira, New York was penalized even though he had not induced reliance on his apparent authority. The U.S. Air Force Court of Military Review held that “no further act is necessary to assert authority as an officer. By wearing the uniform and insignia of an officer, [the defendant] is asserting that he is an officer and is entitled to the respect and courtesies [sic] accorded the status of a commissioned officer . . . ”148 Arguably, the mere wearing of any uniform (of a doctor, clergyman, policeman, etc.) could give others a false impression of authority, but as stated earlier, laws governing the impersonation of other professionals generally follow the traditional format of fraud laws. The question then remains: why was the SVA enacted, criminalizing false claims and thus even further lowering the evidentiary burden required to prosecute these sorts of impostors? The answer lies in how the interest protected by the law is framed (as institutional, rather than individual) and in why the law was passed.

143. See United States v. Alvarez, 617 F.3d 1198, 1209-12 (9th Cir. 2010), cert. granted, 132 S. Ct. 457 (2011).
144. Id. at 1210.
145. Id. The court also explained that defamation law is based on the premise that even when the truth is brought to light, the harm caused by the defamatory statement remains. In contrast, when a military impostor is revealed, he is publicly humiliated, thus ameliorating any harm and serving as a check upon future false claims. Id. at 1211 (“When valueless false speech, even proscribable speech, can best be checked with more speech, a law criminalizing the speech is inconsistent with the principles underlying the First Amendment.”).
146. Id. at 1211.
147. Id. at 1212.
148. 29 M.J. at 977 (citation omitted).
C. Preserving the Honor of True War Heroes and Encouraging Bravery

The true victims of Stolen Valor crimes are, as the Act’s name suggests, the genuine recipients of military decorations.\textsuperscript{149} Unlike uniforms, which are given to members upon entry into the armed services,\textsuperscript{150} the awards protected by the SVA are only conferred upon a small and select group. The decorations are club goods, whose value is diminished with each additional owner.\textsuperscript{151} They are excludable but non-rivalrous, and without their excludability they would be pure public goods, and therefore less valuable. As economist James Buchanan explained:

If individuals think that exclusion will not be fully possible, that they can expect to secure benefits as free riders without really becoming full-fledged contributing members of the club, they may be reluctant to enter voluntarily into cost-sharing arrangements. This suggests that one important means of reducing the costs of securing voluntary co-operative agreements is that of allowing for more flexible property arrangements and for introducing excluding devices.\textsuperscript{152}

Unjustified claims of a right to own the most coveted military awards would decrease the incentive to earn those awards through service. The military as an institution has both a principled obligation to protect and a pragmatic justification for upholding the integrity of its awards system from free-rider raiding. Doing so encourages heroism and thereby ensures its institutional investment.\textsuperscript{153}

Numerous advocates, legislators, and courts have echoed this view. At a 2006 debate in the House of Representatives, both Democratic and Republican congressmen spoke in favor of protecting the dignity of true war heroes.\textsuperscript{154} Democratic Congressman John Conyers, Jr. stated:

\textsuperscript{149} See David Steiner, \textit{Military Lies Are Harmful to Actual Veterans}, \textit{DENVER POST}, Jan. 27, 2010, http://www.denverpost.com/headlines/ci_14273648. This would explain why veterans and their family members are responsible for the majority of the enforcement of the Act. See supra note 125 and accompanying text.

\textsuperscript{150} Doug Sterner has commented that at least for him personally, the misappropriation of the uniform alone is less offensive than the misappropriation of military awards: “I’m not concerned about the uniform; personally I think the uniform is not a costume; but that is a personal preference. . . . I wish people wouldn’t use a uniform as a costume but I don’t have a legal problem with that.” Telephone Interview with Doug Sterner, supra note 8.


\textsuperscript{152} Id.


\textsuperscript{154} See, e.g., 152 CONG. REC. 8823 (2006) (statement of Rep. Sam Graves) (“We cannot allow imposters to cheapen the value of these honors, and we cannot allow imposters to seek fame and fortune from falsehood.”); 152 CONG. REC. 8821 (2006) (statement of Rep. John Kline) (“Regardless of their rationale, those that impersonate combat heroes dishonor the true recipients of such awards. By passing the Stolen Valor Act . . . we have a unique opportunity to return to our veterans and military personnel the dignity and respect taken by those who have stolen it and dishonor them.”); 152 CONG.
Recipients of the Congressional Medal of Honor, the Distinguished Service Award, the Silver Star and the Purple Heart have made considerable sacrifices for our country and, as such, deserve a tremendous amount of our gratitude and respect. It can be said that this legislation represents just one of the many ways of saying thanks for a job well done.\(^{15}\)

Congressman John Salazar, the original sponsor of the SVA in the House, explained the impetus behind the bill by describing his meeting with Pam Sterner, and his reading of B.J. Burkett’s book, *Stolen Valor*, bringing attention to the epidemic of military impersonators. He stated, “Not only do the authors show the price of the [impersonations] has been enormous for society, but they spotlight how it has severely denigrated the service, patriotism, and gallantry of the best warriors America’s ever produced.”\(^{156}\) According to proponents of the SVA, allowing anyone to freely make claims that they have earned military honors renders the entire award system moot.\(^{157}\)

From this perspective, the SVA is less about protecting victims of fraud, than it is about protecting the reputation of soldiers. As Robert Post explains in his article describing the state’s interest in reputation as it functions in defamation law, depending upon the context, reputation may be seen as a form of property,\(^{158}\) honor, or dignity.\(^{159}\) For a member of the military, a reputation for heroism is a form of intangible property, which is earned through his effort and labor.\(^{160}\) It is a form of honor in that a soldier “claims a right to it by virtue of the status with which society endows his social role.”\(^{161}\) In this respect, it is important to the military as an institution because a slight to a soldier’s reputation represents an affront to “the consensus of society with regard to the order of precedence.”\(^{162}\) As Post explains, “[a]n insult to the king involves not only injury to the king’s personal interests, but also damage to the social status

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\(^{15}\) Rec. 8820 (2006) (statement of Rep. F. James Sensenbrenner, Jr.) (“Unfortunately, the significance of these medals is being devalued by phony war heroes who fabricate their honors and military careers. They do so for greed and selfishness, and disrespect the service and sacrifice of our military heroes, as well as the honor they uniquely deserve.”).


\(^{157}\) See, e.g., Telephone Interview with Doug Sterner, supra note 8 (“If anybody can award themselves a Purple Heart, why should the Army, Navy, Marine Corps, and Air Force bother giving the legitimate award of the Purple Heart. The entire award system is moot; it is completely devalued because every time you see a Purple Heart you don’t know if it’s a legitimate one or one that somebody awarded to themselves.”).

\(^{158}\) See also Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1342 (2011) (stating that reputation is a "property-based interest . . . that is owned, can be stolen, and has a calculable value").


\(^{160}\) Id. at 693-94.

\(^{161}\) Id. at 700. In this vein, Post explains that dishonor has a profound effect on one’s identity because of its ties to institutional roles: “Dishonor is a fall from grace in the most comprehensive sense—loss of face in the community, but also loss of self and separation from the basic norms that govern human life.” Id. at 701 (internal quotation marks omitted).

\(^{162}\) Id. at 702 (internal quotation marks omitted).
with which society has invested the role of kingship." The military has a strong interest in protecting the reputation of its workforce if it wishes to retain and attract members.

Finally, a soldier’s reputation is integral to his dignity because it deeply involves his “private personality.” French sociologist Pierre Bourdieu explains in his treatise on social class and the development of tastes that individuals derive value systems from those who surround them, and that the preferences embodied in those value systems help create a sense of identity or “distinction.” The centrality of a soldier’s heroism to his reputation means that the devaluation of his service robs him of property, honor, and dignity.

By recognizing “personal honor” and “human dignity” as protectable legal interests, the SVA is a novelty in American jurisprudence. Comparative law scholar James Whitman conducted an extensive exploration of the law of civility in the United States, Germany, and France, and came to the conclusion that this body of law simply does not exist in our country. He explained that

[j]If we have our bit of quasi-aristocratic tradition lying somewhere in our past, the fact is that honor has, effectively, not survived as a cognizable value in our law . . . . A mere show of disrespect, without an immediate threat of violent breach of the peace, is not punishable in the United States.

Whitman traces the roots of the law of civility in Germany and France to traditions of social hierarchy, founded in notions of aristocratic honor. For this reason, if the Supreme Court upholds the SVA, it will recognize a state interest historically disregarded by American law.

Conclusion

Though this Note does not seek to evaluate the merits of First Amendment challenges to the SVA, it is important to acknowledge the dispute over whether

163. Id.
164. Id. at 707-08.
165. PIERRE BOURDIEU, A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE 13, 23, 260 (1984); Heymann, supra note 158, at 1350 (“Indeed, the way in which we are perceived by others is a significant part of how many of us perceive ourselves, and both individuals and firms often modify their future activities . . . in response to the judgments of others.”).
166. Though Post presents these as three distinct interests, they are overlapping and interrelated. For example, one's property interest in reputation is affected by the value society ascribes to the work being performed, and one's dignity is affected by social norms that one has adopted. See Post, supra note 159, at 693.
167. See James Q. Whitman, Enforcing Civility and Respect: Three Societies, 109 YALE L.J. 1279 (2000). Whitman notes that certain exceptions to this generalization may be found, for example, in anti-dueling statutes, but that overall, American laws relating to civility—including those regulating defamatory and libelous statements—only operate when there is the threat of aggravation or violence. Id. at 1376-78.
168. Id. at 1376.
169. Id. at 1285.
or not protecting "valor" constitutes a compelling governmental interest. A circuit court split emerged when the Tenth Circuit, in United States v. Strandlof, upheld the constitutionality of the SVA,170 two years after the Ninth Circuit struck it down.171 In holding the law constitutional, the Tenth Circuit in Strandlof reversed Judge Blackburn’s district court decision, which stated:

I have profound faith . . . that the reputation, honor, and dignity military decorations embody are not so tenuous or ephemeral as to be erased by the mere utterance of a false claim of entitlement. The social approbation that attends those who would attempt to bask in the reflected glory of honors they have not earned demonstrates that the people of this nation continue to revere our brave military men and women regardless of—or perhaps even more so because of—false and vainglorious attempts to appropriate such accolades.172

Judge Smith similarly held, in his Ninth Circuit decision in Alvarez, that the government cannot restrict speech "as a means of self preservation" and that there were other constitutional ways to preserve the value of military honors.173 The Tenth Circuit, however, has not been alone in recognizing the constitutionality of the Act, as three district courts have also given credence to the government’s substantial interest in protecting its awards system.174

The legal battle over the validity of the SVA will soon be resolved when the Supreme Court renders its decision in Alvarez.175 Though the trend in the Court’s recent First Amendment jurisprudence, as evinced in Brown v. Entertainment Merchants Association, Snyder v. Phelps, and Citizens United v. FEC,176 makes it seem likely that the tribunal will rule in favor of free speech rights and invalidate the SVA, the oral argument in Alvarez cast doubt on this prediction. Respondent’s counsel conceded that the SVA did not chill truthful speech177 and that false speech uttered with the intent to gain something of

170. 667 F.3d 1146 (10th Cir. 2012).
173. 617 F.3d at 1210 ("Preserving the value of military decorations is unquestionably an appropriate and worthy governmental objective that Congress may achieve through, for example, publicizing the names of legitimate recipients or false claimants, creating educational programs, prohibiting the act of posing as a veteran to obtain certain benefits, or otherwise more carefully circumscribing what is required to violate the Act.").
175. See October Term 2011, supra note 6.
176. Brown v. Entm’t Merch. Ass’n, 131 S. Ct. 2729 (2011) (invalidating a law imposing restrictions and labeling requirements on the sale or rental of violent video games); Snyder v. Phelps, 131 S. Ct. 1207 (2011) (upholding the right to picket outside military funeral service); Citizens United v. FEC, 130 S. Ct. 876 (2010) (holding that the government may not censor political broadcasts in elections where those broadcasts are funded by corporations or unions).
value may be punished.178 These statements constituted significant admissions according to Chief Justice Roberts and Justice Kagan.179 Nonetheless, during the government’s argument, the Justices pressed hard on how far the law could go in penalizing false claims: could it extend to false claims regarding having earned a high school diploma?180 False claims regarding the military achievements of a friend or relative?181 False claims made by a political candidate?182 These difficult questions and nuanced distinctions could lead the Court to avoid falling down a slippery slope and strike down the law.

Even if the Supreme Court deems the speech element of the SVA unconstitutional this year, however, the bulk of the law regulating the use of military uniforms and decorations will remain in force. It will remain illegal to wear unearned military uniforms or decorations (or likenesses thereof) even if one lacks the intent to deceive.183 This leaves a number of questions unanswered: can the mere wearing of military uniforms and decorations be considered speech? If so, is this distinguishable from verbal speech? Is there a reason that false claims are more worthy of First Amendment protections than misleading visual representations? It may simply be that there are fewer instances of physical misappropriation of military uniforms and decorations than there are lies told regarding military service. Or, it may be that there are fewer instances in which those sorts of perpetrators are caught. It remains worth exploring, however, how these laws function differently and reflect different sets of values.

Perhaps the unauthorized wearing of military attire more closely resembles traditional notions of what constitutes fraudulent activity and therefore does not as readily offend our sensibilities in naming it a crime. When it comes to misappropriation by military outsiders, however, the purpose of the SVA and related laws is not to protect victims of the alleged fraud but rather to protect the true owners of military honors. Tracing the roots of the law back to medieval sumptuary laws, and more specifically, heraldic laws, clarifies the functional and symbolic significance of the SVA. Current regulations involving military uniforms and decorations serve three functions: they act as a social ordering device; they enhance public safety; and they protect the government’s investment in the military awards system.

178. Id. at 45-46.
179. Id. at 37, 46.
180. Id. at 8-9.
181. Id. at 14-15.
182. Id. at 18-19.
183. This portion of the law (as set out in Sections 701, 702, 703 and 704(a) and (d)) was set to be challenged in United States v. McManus; however, the defendant died before the case went to trial and the case was dismissed. Memorandum of Law in Support of Motion to Dismiss, United States v. McManus, No. 4:10-CR-00074 (S.D. Tex. Sept. 20, 2010); E-mail from James Fallon, Attorney for Michael McManus, to author (Aug. 31, 2011, 12:09 EST) (on file with author).
The practical implications of the SVA distinguish it from other regulations impinging upon the free exercise of expression. Unlike protest activities at a military funeral\textsuperscript{184} or the desecration of an American flag,\textsuperscript{185} the misappropriation of military honors can pose a more direct threat to national security. Not only can it devalue the awards received by true war heroes, thereby disincentivizing courageous acts in war, but it can also create immediate confusion regarding sources of apparent authority. The American government traditionally has recognized these public safety concerns as having the potential to override First Amendment interests.\textsuperscript{186}

To the extent that the SVA protects the military’s institutional investment in its awards system, if the Supreme Court strikes down the law, Congress may benefit from alternative mechanisms of safeguarding this interest which do not implicate the First Amendment issues at the heart of \textit{United States v. Alvarez}. Besides creating databases publicizing information regarding who has received military awards (which to some extent already exist),\textsuperscript{187} traditional fraud laws, with heightened penalties for violations relating to military service, may provide the best protection against “stolen valor.” This would not only serve the SVA’s functional goal of protecting national security but would also serve the symbolic goal of according heightened respect to the military.

Just as the laws of heraldry privileged the military class throughout medieval European society, current regulations concerning military uniforms and decorations protect American veterans from “stolen valor.” Though the United States has historically prided itself on being a casteless society, this Note demonstrates that American law has long acknowledged a unique and respected place for the military. At least with respect to this branch of the government, the uniquely European law of civility remains intact. If the Supreme Court upholds the SVA, it will open the door to the expansion of this body of law concerning the regulation and protection of honor.


\textsuperscript{185} Texas \textit{v. Johnson}, 491 U.S. 397 (1989) (determining that the burning of the American flag in protest activities is expressive conduct protected under the First Amendment).

\textsuperscript{186} The classic Supreme Court case on the balance between freedom of speech and public safety is \textit{Schenck \textit{v. United States}}, 249 U.S. 47, 52 (1919), in which the Court held that \[ \text{[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. . . . When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right}. \]