

SEPARATION OF POWERS

This activity is an appellate hearing and explores the legal concept of separation of powers by analyzing the Supreme Court case *U.S. v. Alvarez*.

About These Resources

- Overview of [separation of powers](#) in action.
- Analyze the [facts and case summary](#) of *U.S. v. Alvarez*
- Read what the Court decided in its [holding](#).
- Use the [glossary](#) to understand the appellate process.
- Use or modify the sample [agenda](#) (pdf)

Activities

- Role play with the [appellate court simulation](#)
- Use the [worksheet](#) to determine: How Would You Decide?

How to Use These Resources

A federal judge is the Chief Justice and two lawyers coach the student attorneys. Every student plays a role. Eight are Supreme Court Justices. All others are members of two attorney teams – one representing the U.S. and one representing Alvarez. Student attorneys choose from the arguments listed on the worksheet provided as they prepare for and conduct a simulation of appellate arguments. Student justices ask questions of the student attorneys.

Teacher/Judge and Attorneys Prep Time: Reading the prepared materials (*30 minutes*).

Timing – As a Classroom Activity: One 50-minute class period. In-class preparation (*15 minutes*) Presentation and oral argument simulation (*20 minutes*) Debriefing (*15 minutes*). Teacher or a guest attorney presents the Supreme Court's decision using the prepared materials.

Students' In-Class Preparation: (*15 minutes*) (1) All students read the prepared materials. They **do not** receive or read the holding in *U.S. v. Alvarez* at this time. (2) Two students prepare to present the [facts of the case](#). (3) Half of the students are assigned to represent Alvarez. Half of the students are assigned to represent the U.S. (4) Using the [How Would You Decide worksheet](#), the students on each side work in small groups to identify which arguments support Alvarez (A) and which support the U.S. Government (US).

Note About Distributing the Court's Holding: The [holding](#) in the case is not distributed until the attorneys and judge conduct the debriefing, after the oral arguments. During the debriefing, the attorneys go through the ruling and explain a plurality opinion.

Timing – As a Courtroom Activity (Prep Time Included): One 90-minute court session with a judge and attorneys. Two attorneys present the [facts of the case](#) (*20 minutes*). Participants prepare for oral arguments – same as classroom preparation – using the small-group [worksheet exercise](#) (*10 minutes*). For the oral arguments simulation, see the [Supreme Court simulation box](#) (*30 minutes*). Debriefing with judge and attorneys (*30 minutes*).

SEPARATION OF POWERS IN ACTION

The U.S. Constitution establishes three separate but equal branches of government: the legislative branch (makes the law), the executive branch (enforces the law), and the judicial branch (interprets the law). The Framers structured the government in this way to prevent one branch of government from becoming too powerful, and to create a system of checks and balances.

Under this system of checks and balances, there is an interplay of power among the three branches. Each branch has its own authority, but also must depend on the authority of the other branches for the government to function.

U.S. v. Alvarez is an excellent example of how the three branches each exercise their authority.

In a Nutshell

- **The Legislative Branch** – Congress – passed the [Stolen Valor Act of 2005](#), punishing those who misrepresent that they have received high military honors.
- **The Judicial Branch** – the Supreme Court of the United States – [ruled in 2012](#) that the Act was unconstitutional because it infringed on the right to free speech protected by the First Amendment.
- **The Executive Branch** – the Pentagon and the President – [took action](#) within a month of the Supreme Court's decision establishing a government-funded national database of medal citations – phased in over time – to enable verification of military honors.
- **The Legislative Branch** – Congress – is considering legislation that is more narrow than the Stolen Valor Act of 2005. The Stolen Valor Act of 2011 would make it a federal misdemeanor for anyone to benefit financially from false claims about military service, records, or awards. That would include receiving health care benefits, government contracts, or jobs reserved for veterans. The modified version of the law provides punishments for those seeking to profit strictly from false military service. Follow the progress of the [Stolen Valor Act of 2011](#).

FACTS AND CASE SUMMARY

Facts and case summary for *U.S. v. Alvarez*.

FACTS

In 2007, [Xavier Alvarez](#), an elected member of a water district board in California, identified himself at a public meeting as a retired U.S. Marine who had been wounded in combat many times and had received the Congressional Medal of Honor.

"I'm a retired Marine of 25 years. I retired in the year 2001," Mr. Alvarez said at a public meeting of the board. "Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy."

None of Alvarez's claims was true. He never served in the Marine Corps or any branch of the military, was never wounded in combat, and has never received a medal of any kind, including the nation's highest military award – the Medal of Honor. Alvarez had previously boasted, untruly, that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico.

PROCEDURAL HISTORY

After FBI agents obtained a tape recording of the meeting, federal prosecutors charged Alvarez with two counts of violating the Stolen Valor Act. Alvarez's lawyer argued that the Stolen Valor Act was invalid under the First Amendment and, therefore, the case should be dismissed. The trial court rejected this argument. Alvarez was tried and convicted in the United States District Court for the Central District of California. He was sentenced to probation for three years and ordered to pay a \$5,000 fine. He was the first person convicted under the Stolen Valor Act.

Alvarez appealed the First Amendment issue, claiming that the Stolen Valor law violated the First Amendment and, therefore, his conviction was unlawful. A three-judge panel of the United States Court of Appeals for the Ninth Circuit agreed with Alvarez and reversed his conviction, declaring the Stolen Valor Act unconstitutional in a vote of 2-to-1.

The government appealed the case to the Supreme Court of the United States, which agreed to hear it. After the Court agreed to hear the case, the United States Court of Appeals for the Tenth Circuit, ruling in a different case, declared the Stolen Valor Act constitutional in a vote of 2-to-1.

Oral arguments were heard on February 22, 2012.

ISSUE

Whether the Stolen Valor Act, which makes it a crime to lie about receiving military medals or honors, violates the First Amendment's guarantee of the right to free speech.

Read how the Supreme Court decided in *U.S. v. Alvarez* [here](#).

HOLDING

On June 28, 2012, the Court issued its ruling in *United States v. Alvarez*. A majority of the Court concluded that the Stolen Valor Act violated the First Amendment and therefore, was unconstitutional.

The Plurality Opinion

The plurality opinion, written by Justice Kennedy and joined by Chief Justice Roberts, Justice Ginsburg, and Justice Sotomayor, concluded that the content-based regulations on speech could not meet the exacting requirements of the First Amendment. The First Amendment generally does not allow restriction of the message, ideas, subject matter, or content of expression. The Constitution "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden" of showing that the restrictions on speech are constitutional.

As a general rule, content-based restrictions on speech have been permitted only when confined to a few "historic and traditional categories of expression," such as speech likely to incite imminent lawless action, speech integral to criminal conduct, "fighting words," child pornography, fraud, and speech presenting some grave and imminent threat that the government has the power to prevent.

The plurality made the following points:

- Falsity alone may not be enough to exclude speech from the protection of the First Amendment.
- The Stolen Valor Act was too broad. It applied to a false statement made at any time, in any place, to any person, without regard to whether the lie was motivated by the possibility of financial gain.
- If the Court upheld the Stolen Valor Act's restrictions on false speech, the Court would be endorsing government authority to compile a potentially unlimited list of false statements that could be punishable by law.
- In essence, this could give the government broad and unprecedented censorship powers. The plurality concluded that even though the government has a compelling interest in protecting the Medal of Honor, the restrictions in the Stolen Valor Act are not "actually necessary" to achieve that protection. The government failed to point to any evidence that the public's general perception of military awards is diluted by false claims, such as those made by Alvarez.

The plurality concluded that even though the government has a compelling interest in protecting the Medal of Honor, the restrictions in the Stolen Valor Act are not "actually necessary" to achieve that protection. The government failed to point to any evidence that the public's general perception of military awards is diluted by false claims, such as those made by Alvarez.

"Indeed, the outrage and contempt expressed for [Alvarez's] lies can serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose."

The plurality noted that "[t]he remedy for speech that is false is speech that is true. . . . The theory of the Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.' The First Amendment itself ensures the right to respond to speech we do not like, and for good reason."

The plurality also made the following points:

- Freedom of speech and thought does not flow from the generosity of the state; it is an inalienable right.
- Government suppression of speech can make exposure of falsity more difficult, not less so.
- Society has the right and civic duty to engage in open, dynamic, rational discourse.
- "These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates."

The Concurring Opinion

Justice Breyer and Justice Kagan concurred in the judgment. However, the concurring opinion concluded that even under a less strict standard, the Stolen Valor Act was unconstitutional. Because the Stolen Valor Act applies in all contexts, including family, social, or other private contexts where lies are unlikely to cause harm, the prohibitions of the Stolen Valor Act created too significant a burden on speech.

The Dissenting Opinion

Justice Alito, Justice Scalia, and Justice Thomas dissented. The dissent contended that false statements about military medals merit no First Amendment protection. The dissenters noted that false statements may be protected when laws restricting them might chill otherwise protected speech. However, the dissenting justices concluded that the Stolen Valor Act does not violate the Constitution because the subject matter of the lies does not relate to any protected expression.

GLOSSARY

Plurality Opinion

A plurality opinion is an appellate opinion without enough judges' votes to constitute a majority of the court. The plurality opinion is the opinion that received the greatest number of votes of any of the opinions filed.

Because a majority could not reach a common view, a plurality opinion is not binding. It has precedential value in terms of the ruling. However, the rationale may be referred to in subsequent cases, but it does not have the same precedential authority as an opinion written by a majority of the Court.

About Appeals

An appeal is available if a party is dissatisfied with the outcome at the trial level. Common reasons for an appeal include claims that the trial proceedings were unfair or that the trial judge incorrectly applied the law.

The Purpose of Appellate Courts

The appellate courts do not retry cases or hear new evidence. They review the trial court record to make sure that the proper law was applied and that the proceedings were fair.

Appellant v. Appellee

The party seeking an appeal (in this case, the government) is called an appellant or petitioner. The responding party (in this case, Alvarez) is known as an appellee or respondent. Each side presents written arguments, called briefs, to the appellate court. Others interested in the case may seek permission to file an *amicus curia* (friend of the court) brief.

Getting to the Supreme Court

Parties who are not satisfied with the decision of a lower court must petition the Supreme Court of the United States to hear their case. Parties ask the Court to grant a *writ of certiorari*, which means that the Supreme Court orders a lower court to send the record of the case for its review. The Supreme Court usually is not under any obligation to hear these cases, and it usually only does so if the case could have national significance, might harmonize conflicting decisions in the federal Circuit courts, and/or might set a precedent for other courts to follow.

According to the Supreme Court's rules, four of the nine Justices must vote to accept a case. The Court accepts 100-150 of the more than 7,000 cases that it is asked to review each year. If the Justices decide to accept a case (grant *certiorari* or grant *cert*), the case is scheduled on the docket. According to the Supreme Court's rules, the petitioner has a certain amount of time to write a brief, putting forth the arguments on the issue(s) before the Court. After the petitioner's brief has been filed, the respondent is given a certain amount of time to file a brief. Briefs may not exceed 50 pages.

COURTROOM AGENDA

U.S. v. Alvarez: Stolen Valor or Stolen Freedom of Speech?

(Program Time ~ 2 hours)

- | | |
|------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1:30 – 2:00 p.m.
<i>(30 minutes)</i> | Students arrive, get settled in the courtroom, and receive an orientation. |
| 2:00 – 2:20 p.m.
<i>(20 minutes)</i> | Attorney coaches introduce themselves. They present the facts (but not the Supreme Court's holding) in <i>U.S. v. Alvarez</i> . Each attorney coach works with one group, including the student attorneys, to identify the arguments that help their side, using the <i>How Would You Decide?</i> worksheet. |
| 2:20 – 2:30 p.m.
<i>(10 minutes)</i> | Each attorney coach work with his/her four student attorneys at the counsel tables to prepare them for the oral arguments. They go over the <u>scripted opening protocol for attorneys</u> . (LINK) The presiding judge, as the Chief Justice, meets with the Associate Justices in chambers to help them develop questions to be asked of the student attorneys during oral arguments. <i>All other students have a break.</i> |
| 2:30 – 3:00 p.m.
<i>(30 minutes)</i> | Oral arguments. Follow Supreme Court procedures |
| 3:00 – 3:30 p.m.
<i>(30 minutes)</i> | Debriefing. Attorneys present the Supreme Court holding. Q & A session on any topic with the presiding judge. Students fill out evaluations. |
| 3:30 p.m. | Adjournment |

APPELLATE COURT SIMULATION

This activity is a simulation of a [Supreme Court oral argument](#). It is not a trial. At the trial, witnesses gave testimony that showed Alvarez made the false statements he was charged with under the Stolen Valor Act.

The question before the student appellate court is not whether Alvarez made false claims that he served in the military and received medals. The trial court established that he made the statements.

The question in the case is: Whether the Stolen Valor Act, which makes it a crime to lie about receiving military medals or honors, violates the First Amendment's guarantee of the right to free speech.

In Advance: Teachers assign students to their roles. Eight are Associate Supreme Court Justices. Eight are attorneys (four on each side). All other students are organized into two groups – lawyers for the U.S. or for Alvarez.

Supreme Court Simulation Oral Argument Procedures

1. The Chief Justice (the teacher in the classroom or a presiding judge in the courtroom) calls the Court to order, announces the case, and asks the petitioner to begin.
2. The lawyers for the petitioner present their side of the initial argument for about two minutes.
3. After the lawyers finish, the Justices ask questions of the student attorneys and/or any student representing the petitioner for about two minutes.
4. The lawyers for the respondent present their side's initial argument for about two minutes.
5. The Justices ask questions for about two minutes of the student attorneys and/or any student representing the respondent for about two minutes.
6. The lawyers for the petitioner present rebuttal arguments for about one minute.
7. The lawyers for the respondent present rebuttal arguments for about one minute.
8. Once arguments have been completed, the Justices deliberate in front of the group for about 10 minutes. At the conclusion of the deliberations, each Justice stands to give his/her decision and reason(s).
9. The teacher/presiding judge asks for a show of hands among the Justices and announces the decision. The teacher/presiding judge, then asks for a show of hands vote from all of the students.
10. The teacher/presiding judge leads a debriefing and discussion.

WORKSHEET - HOW WOULD YOU DECIDE?

Instructions and Answer Guide: Review the arguments below. Identify the arguments that help Alvarez **(A)** and those that help the United States **(US)**. The answers listed here are merely a guide. Responses should be evaluated on how well participants defend their arguments. Participants may modify the arguments listed here and add their own arguments.

Arguments Answer Guide

Arguments: How Would You Decide?

Review the arguments below. Identify the arguments that help Alvarez **(A)** and those that help the United States **(US)**. Check the answers by clicking on the Answer Guide tab.

1. False statements about military medals merit no First Amendment protection.
2. Falsity alone may not be enough to exclude speech from the protections of the First Amendment.
3. Lies about military service and recognition are not trivial, like lying about one's weight or bowling score. Military-awards programs date back to the days of General George Washington. They stir up deep, patriotic feelings that motivate troops and console grieving families. To condone lying about military recognition cheapens the medals on every soldier's uniform and the heroic acts they recognize and represent.
4. The Government failed to point to any evidence that the public's general perception of military awards is diluted by false claims, such as those made by Alvarez.
5. The outrage and contempt expressed for Mr. Alvarez's lies can reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose.
6. Military service and honors deserve First Amendment protection from liars.
7. Suppression of speech by the government can make exposure of falsity more difficult, not less so.
8. The Stolen Valor Act is too broad. It is an attempt to control and suppress all false statements on this one subject in almost limitless times and settings. And it does not consider whether the lie was made for the purpose of financial gain.
9. It has long been clear that First Amendment protection does not hinge on the truth of the matter expressed.
10. Criminal punishment for lying is not the best and only way to ensure the integrity, meaning, and value of military medals. The greatest damage done in such lies is to the reputation of the liars themselves, not to the reputations of the real medal holders.
11. The federal court of appeals ruled that lying about one's military record is protected free speech. However, liars who disrespect those who died to preserve the First Amendment don't deserve its protections in the justice system.

12. If the government wants to stop people from falsely claiming that they have received military medals, the way to do it is a searchable database that anyone can easily check to see if their claims are true.
13. The remedy for speech that is false is speech that is true . . . The theory of the Constitution is "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."
14. When soldiers follow government orders to protect the United States and the Constitution, the government owes the soldiers' reputations protection from lies that dishonor their service. In other words, when soldiers die for the government, they should be protected by the government.
15. The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from what benefits the state but from the inalienable rights of the person.
16. The First Amendment protects the right to speak and write whatever one chooses – including, to some degree, statements that may seem worthless or offensive or statements that can be proven false – without cowering in fear of a powerful government.
17. The Stolen Valor Act does not violate the Constitution. False statements may be protected when laws restricting them might chill protected speech. In this case, the subject matter of the lies does not relate to any protected expression.
18. There was no malice intended or harm done, since Mr. Alvarez made his false claims when he introduced himself as a new member of the Three Valley Water District Board of Directors in California. Being exposed for lying should be enough punishment and social control for a fabrication of this kind. There is no need for government involvement when the community will enforce social sanctions on Mr. Alvarez.
19. Criminal sanctions are appropriate in this case. There are numerous laws that punish lying and establish it as a crime, even when there is no proof of harm done by the lie.
20. Examples of laws that punish lies include:
 - Perjury is punishable in 17 states, even when the lie has no effect on the trial.
 - Nearly all states prohibit "false swearing," a perjury-like statute that treats lying under oath as a crime.
 - Some "obstructing justice" statutes that prohibit lying to police do not require that any actual harm result from the lie for it to be considered a crime.
 - Lying on a military enlistment application is against the law, regardless of whether there are detrimental consequences that come from the government's reliance on the false information.
21. The First Amendment protects unpopular speech.
22. There is a slippery slope here: Once one kind of speech is criminalized, there is the risk the government may criminalize other lies. Could a law banning lies on Facebook follow? Could the government criminalize lying about one's age? Does society want to run that risk?

23. There is no slippery slope here. There is no reason to tolerate false statements about military heroism. Lying about receiving military honors is a carefully defined subset of false statements undeserving of First Amendment protection.
24. Upholding the Stolen Valor Act could give the government broad and unprecedented censorship powers.
25. When soldiers die for the First Amendment, they should be protected by it.
26. The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from what benefits the state but from the inalienable rights of the person.

WORKSHEET - HOW WOULD YOU DECIDE?

Instructions and Answer Guide: Review the arguments below. Identify the arguments that help Alvarez **(A)** and those that help the United States **(US)**. The answers listed here are merely a guide. Responses should be evaluated on how well participants defend their arguments. Participants may modify the arguments listed here and add their own arguments.

Arguments Answer Guide

Answer Guide: How Would You Decide?

Answers listed here are merely a guide. Responses should be evaluated on how well participants defend their arguments.

1. **(US)**
2. **(A)**
3. **(US)**
4. **(A)**
5. **(A)**
6. **(US)**
7. **(A)**
8. **(US)**
9. **(A)**
10. **(A)**
11. **(US)**
12. **(A)**
13. **(A)**
14. **(US)**
15. **(A)**

16. (A)

17. (US)

18. (A)

19. (US)

20. (US)

21. (A)

22. (A)

23. (US)

24. (A)

25. (US)

26. (A)