

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Commerce Committee

BILL: CS/SB 1824

INTRODUCER: Commerce Committee and Senator Gelber

SUBJECT: Misrepresentation of military status

DATE: March 10, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Cooper	CM	Fav/CS
2.	_____	_____	CJ	_____
3.	_____	_____	JA	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This CS makes it unlawful for a person to solicit funds by falsely stating that he or she is a member or representative of the United States Armed Forces or the National Guard. In addition, the CS prohibits a person from wearing the uniform of, or any medal or insignia authorized for use by members or veterans of, the United States Armed Forces or the National Guard, if he or she intends to misrepresent himself or herself as a member or veteran of the United States Armed Forces or the National Guard while soliciting for charitable contributions.

Any person, who commits a prohibited act in the CS, commits a felony of the third degree.

This CS amends s. 496.415, F.S., and creates s. 817.312, F.S.

II. Present Situation:

United States Armed Forces

Article I, s. 8 of the United States (U.S.) Constitution, grants Congress the power to:

- Raise and support Armies, provide and maintain a Navy, and call forth a Militia to execute the Laws of the Union and suppress insurrections and repel invasions.
- Provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the Officers.
- Train the Militia according to the discipline prescribed by Congress.

Article II, s. 2 of the U.S. Constitution, provides that the President shall be the “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”

The five military branches that exist within the United States Armed Forces are the Army, Marine Corps, Navy, Air Force, and the Coast Guard.¹ These branches often work together, especially in times of war, to facilitate troop movements, equipment, food, armaments, and medical supplies.²

Army

The Army is the oldest military branch, established in the U.S. during the Continental Congress on June 14, 1775.³ The Army is also the largest U.S. military branch.⁴ The Army consists of approximately 675,000 soldiers; approximately 488,000 are on active duty and 189,000 are in the Army Reserve.⁵ The primary duty of the Army is to protect and defend not only the U.S., but also its interests around the world through the use of ground troops, artillery, and tactical weapons.⁶

Marine Corps

The Marine Corps was also established by the Continental Congress on November 10, 1775.⁷ The Marine Corps is one of the smallest branches of the U.S. military having approximately 200,000 marines.⁸ The primary function of the Marine Corps is to act as an assault force to control beachheads and prepare the way for landing forces of the U.S. Navy, as well as Army personnel.⁹ Because the Marine Corps works closely with the Navy in times of war, they are able to rapidly deploy through the use of their own air power.¹⁰

¹ Soldier.net Land-based armed forces, *Five Branches of the Military*, available at <http://www.soldier.net/five-branches-of-the-military/>.

² *Id.*

³ *Id.* See also, GoArmy.com, *About the Army: Commissioned Officer*, available at <http://www.goarmy.com/about/officer.jsp>.

⁴ *Id.*

⁵ GoArmy.com, *About the Army: Personnel*, available at <http://www.goarmy.com/about/personnel.jsp>.

⁶ *Supra* fn. 1.

⁷ *Id.* See also, Marines: The Few. The Proud., *1775: Founding of the Marine Corps*, available at http://www.marines.com/main/index/winning_battles/history/missions/founding_of_the_marine_co.

⁸ Navy.org, *Which Military Branch: 5 Branches of the US Military – Which One Do You Like?*, available at http://www.navy.org/which_branch/.

⁹ *Supra* fn. 1.

¹⁰ *Id.*

Navy

Like the Army and the Marine Corps, the Continental Congress established the U.S. Navy in 1775.¹¹ The Navy has approximately 330,000 active duty personnel and 104,000 reservists.¹² The Navy is primarily assigned the duty of maintaining and ensuring freedom on the open seas.¹³ Naval ships, including aircraft carriers and destroyers, couple their efforts with the Air Force to transport combat personnel over the open seas.¹⁴

Air Force

The Air Force is youngest the branch of the U.S. Armed Forces. The National Security Act of 1947 was passed on July 26, 1947, and became effective on September 18, 1947.¹⁵ The act created the Department of the Air Force, headed by a Secretary of the Air Force.¹⁶ Prior to 1947, it was known as the Army Air Forces and was designed to support Army ground forces.¹⁷ Following World War II, the Air Force was created to defend the United States in the air as well as in outer space.¹⁸ There are approximately 330,000 individuals on active duty in the Air Force.¹⁹

Coast Guard

The Coast Guard is created in Title 14 of the U.S. Code, which states: “The Coast Guard as established January 28, 1915, shall be a military service and a branch of the Armed Forces of the United States at all times.”²⁰ The Coast Guard has approximately 42,000 individuals serving on active duty.²¹ Upon the declaration of war or when the President directs, the Coast Guard operates under the authority of the Department of the Navy.²² Otherwise, the Coast Guard is to provide law enforcement support as well as rescue services in peacetime.²³

¹¹ *Id.* See also, Naval History & Heritage Command, *Navy Birthday Information – 13 October 1775*, available at <http://www.history.navy.mil/birthday.htm>.

¹² Navy.mil, Official Website of the UNITED STATES NAVY, *Status of the Navy*, available at http://www.navy.mil/navydata/navy_legacy_hr.asp?id=146.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ The official web site of the U.S. Air Force, *Air Force History Overview*, available at <http://www.af.mil/information/heritage/overview.asp>. See also, The official web site of the U.S. Air Force, *The U.S. Air Force*, available at <http://www.af.mil/information/factsheets/factsheet.asp?id=2>.

¹⁶ *Id.*

¹⁷ *Id.* See also, *supra* fn. 1.

¹⁸ *Supra*, fn. 1. See also, Air Force Space Command, *Heritage 1940s-1950s*, available at <http://www.afspc.af.mil/heritage/1940s-1950s.asp>.

¹⁹ Air Force Personnel Center, *Air Force Demographics*, available at <http://www.afpc.randolph.af.mil/library/airforcepersonnelstatistics.asp>.

²⁰ United States Coast Guard U.S. Department of Homeland Security, *About Us*, available at <http://www.uscg.mil/top/about/>.

²¹ *Id.*

²² *Id.*

²³ *Supra* fn. 1.

The Organized Militia

Early in our nation's development, state militias served an important role, frequently in concert with the professional Armed Forces, in securing the population's safety and our nation's freedom from foreign powers. A militia is founded on the idea that "all able-bodied male members of a society are liable for military service in times of emergency to protect that society."²⁴

Today the National Guard is the "organized militia" reserved to the states by the U.S. Constitution.²⁵

During peacetime, the National Guard is commanded by the governor of each respective state or territory.²⁶ The appointment of officers and the authority of training the militia are left to the states.²⁷ In 1903, Congress officially designated the organized militia as the National Guard and established procedures for training and equipping the Guard to active duty military standards.²⁸ The U.S. Constitution prohibits states from keeping a standing army without the consent of Congress.²⁹

State Defense Force

The State Defense Force is a form of militia and is authorized to the states by federal statute, but State Defense Forces are not entities of the federal government.³⁰ They are organized, equipped, trained, employed and funded according to state laws and are under the exclusive jurisdiction of the governor.³¹ The State Defense Force assumes the National Guard's mission for the state's security if the National Guard is mobilized for war, responds to specialized operations such as humanitarian or peacekeeping missions, or is called into federal service during national emergencies.³²

Unorganized Militia

Title 10 U.S.C. 311, defines the unorganized militia as all members of the militia who are not members of the National Guard or Naval Militia.

Self-Proclaimed Private Militias

Some private individuals, without government sanction, have banded together and styled themselves "militias," which are private organizations that answer to no government, have no

²⁴ Hawk, Robert, *Florida's Army: Militia, State Troops, National Guard 1565-1985*, p. 3. Englewood, Fl.: Pineapple Press, 1986.

²⁵ National Guard: Always Ready Always There, *For the Media: Fact Sheets: National Guard and Militias* (use link to document), link available at <http://www.ng.mil/media/default.aspx#factsheets>. See also, Art. 1, s. 8, U.S. Const.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Article I, s. 10 (3), U.S. Const.

³⁰ *Supra* fn. 25. See also, Title 32 U.S.C. 109.

³¹ *Supra* fn. 25.

³² *Id.*

formal or informal relationship with the National Guard, and are not state-recognized organizations.³³

Organized Militia in Florida

Article X, s. 2(a) of the Florida Constitution, creates the state militia, which is “composed of all able-bodied inhabitants of the state who are or have declared their intention to become citizens of the United States...”

Section 250.02, F.S., segregates the militia into two general categories:

- The unorganized militia, which is composed of all persons subject to military duty, but who are not members of units of the organized militia; and
- The organized militia, which is composed of the National Guard and such other organized military forces as are now or may be authorized by law.

Unorganized Militia in Florida

From its early history, Florida had an “enrolled” or mass militia, consisting of an unorganized and untrained ‘pool’ of able-bodied men of the state. As was the experience in other states, the militia was primarily used locally and before the development of either volunteer militias or organized state guard units. Historically, this “great body of armed citizenry” constituted a reservoir of manpower for the regular army and for the National Guard.³⁴

In addition to the enrolled militia, local communities in Florida organized volunteer militia units, legally part of the enrolled militia, who met and trained on a semiregular basis. This volunteer militia evolved into the Florida National Guard.³⁵

The Florida State Defense Force

The Florida State Defense Force (initially named the Florida Defense Force, and renamed the Florida State Guard) was created in 1941. Section 251.01, F.S., stipulates that it be composed of “officers commissioned or assigned, and such able-bodied citizens of the state as shall volunteer for service therein...”

By January 1941, all Florida National Guard units had been federalized. In response, the Legislature established the Florida Defense Force, under the State’s Adjutant General, to assume the function and status of the National Guard within the state.³⁶ It maintained the state’s armories and engaged in training programs to prepare volunteers for state service. It had an average strength of 2,000, and more than 11,000 served between 1941 and 1946. They were officially activated seven times, either in response to hurricanes or to protect prisoners from mobs. The federal government provided surplus weapons and equipment, while the Legislature provided funding for uniforms and equipment, staffing necessary for administration, and limited funds for active duty pay. However, volunteers were not paid for drilling and training.

³³ *Id.*

³⁴ Whisker, James B., *The Rise and Decline of the American Militia System*, p. 370. NJ: Associated University Press, 1999.

³⁵ Hawk, p. 5.

³⁶ Hawk, p. 162 – 166.

The Florida State Defense Force was de-activated when the Florida National Guard units returned after the war.

The Florida National Guard

The Florida National Guard (FNG) is the state’s modern “organized” militia. The FNG is composed of

...members of the militia enlisted therein and of commissioned officers and warrant officers who are citizens of the United States, organized, armed, equipped, and federally recognized, in accordance with the laws of the state and the laws and regulations of the Department of the Army and the Department of the Air Force.³⁷

The FNG is an essential reserve component of the national defense force.³⁸ Its organization, arms, and training correspond to that of the federal military. The National Guard Bureau of the Department of Defense (DOD) determines the number of units and positions for the FNG, consistent with the force structure requirements of DOD’s overall national military strategy.

The FNG is also the governor’s primary military force to “preserve the public peace, execute the laws of the state, suppress insurrection, or repel invasion.”³⁹ Over its history, the Governor has mobilized the FNG primarily in response to natural disasters.

Military Charitable Organizations

The conflicts in Afghanistan and Iraq have brought renewed attention to the men and women serving in the Armed Forces and to their families.⁴⁰ Many Americans, wishing to show their support for those serving or who have served in the military, are donating to charities.⁴¹

There are many charitable organizations that provide assistance to members or veterans of the military or to those member’s or veteran’s families. However, it has been reported that not all charitable organizations effectively provide assistance to military members or veterans or their families. An investigative report conducted by Matthew Kauffman of the *Hartford Courant* found that:

... ‘veterans’ groups are more than twice as likely as other charities to use professional solicitors, which typically keep 70 to 90 cents of every dollar they raise. As a result, ‘veterans’ charities overall spend a vastly greater percentage of

³⁷ Section 250.07, F.S.

³⁸ 10 U.S.C.A., 261.

³⁹ Article IV, s. 1, Fla. Const.

⁴⁰ Heck, Andrew; Charity Navigator; *Supporting America's Heroes- How to Select a Police, Firefighters or Veterans Charity*; available at <http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=280>.

⁴¹ *Id.*

their budgets on fundraising, leaving less money available to help ex-GIs struggling with health care, housing or financial problems.⁴²

Federal Regulation

On December 20, 2006, the “Stolen Valor Act of 2005” was signed into law. The act includes the following Congressional findings.

- Fraudulent claims surrounding the receipt of the Medal of Honor, the distinguished-service cross, the Navy Cross, the Air Force Cross, the Purple Heart, and other decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals.
- Federal law enforcement officers have limited ability to prosecute fraudulent claims of receipt of military decorations and medals.
- Legislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals.⁴³

Section 704, 18 U.S.C., provides that whoever knowingly wears or purchases any decoration or medal authorized by Congress for the U.S. Armed Forces, or any of the service medals or badges awarded to the members of such forces, including imitations, except when authorized under regulations made pursuant to law, shall be fined or imprisoned up to six months, or both.

In addition, whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for U.S. Armed Forces, any of the service medals or badges awarded to the members of such forces, or imitation of such item, shall be fined or imprisoned up to 6 months, or both. If a person makes such representations with a Congressional Medal of Honor, or an imitation, an offender may be fined or imprisoned up to 1 year, or both. Enhanced penalties are also provided for misrepresentation using a distinguished-service cross, a Navy Cross, an Air Force Cross, a silver star, a Purple Heart, or any replacement or duplicate medal for such medals as authorized by law.

State Regulation of Military Charitable Organizations

According to the National Conference of State Legislatures, at least 13 states have proposed legislation or passed legislation to prohibit the impersonation of a member or veteran of the military and provide a penalty for such impersonation.⁴⁴

In Florida, it is unlawful for any person in connection with the planning, conduct, or execution of any solicitation or charitable or sponsor sales promotion to falsely state that the person is a member of, or a representative of, a charitable organization or sponsor, or falsely state or represent that the person is a member of or represents a law enforcement or emergency service

⁴² *Id.* Investigatory report by Matthew Kauffman, staff writer at the Hartford Courant, available at <http://www.charitynavigator.org/index.cfm/bay/content.view/catid/64/cpid/351.htm>.

⁴³ 18 U.S.C. 704.

⁴⁴ National Conference of State Legislatures; *2003-2009 Legislation Regarding Impersonating the Military or Veterans or Unauthorized Use or Display of Uniforms or Medals*; October 14, 2009; on file with the Commerce Committee. Note: The 13 states include NY, CA, KY, OK, CT, NJ, PA, UT, OR, IL, GA, ID, and WA.

organization.⁴⁵ Any person who commits such an act commits an unfair or deceptive act or practice or unfair method of competition in violation of ch. 501, part II, F.S., and is subject to the penalties thereunder.⁴⁶ In addition, a person who commits such a misrepresentation commits a felony of the third degree, or for a second or subsequent conviction, a felony of the second degree.⁴⁷

Section 250.43, F.S., makes it unlawful for any person, other than a person authorized by law, to wear a uniform or insignia of rank worn by officers of the National Guard or wear the uniform of the United States Army, Navy, Marine Corps, Air Force, National Guard, Naval Militia, or Marine Corps or any part of such uniform, or imitation uniform. Such an offense is a misdemeanor of the first degree.⁴⁸

Current law also provides that it is a misdemeanor to wear a badge or insignia of certain organizations or societies if the person does so to obtain aid or assistance within this state or if the person is not authorized by law to wear the badge.⁴⁹

III. Effect of Proposed Changes:

Section 1 amends s. 496.415(6), F.S., to prohibit a person, who is engaged in the planning, conduct, or execution of the solicitation of funds for charitable or sales promotions, from misrepresenting that he or she is a member or representative of the United States Armed Forces or the National Guard.

Any person that commits unlawful conduct under s. 496.415(6), F.S., is subject to the penalties provided for in ss. 496.416 and 496.417, F.S. Specifically, s. 496.416, F.S., provides for the application of a civil penalty of up to \$10,000 per violation under the Florida Deceptive and Unfair Trade Practices Act, part II, ch. 501, F.S. Section 496.417, F.S., provides that the criminal penalty for such conduct is a felony of the third degree and for a second conviction, a felony of the second degree.

Section 2 creates s. 817.312, F.S., to prohibit a person from wearing the uniform of, or any medal or insignia authorized for use by members or veterans of, the United States Armed Forces or the National Guard if he or she intends to misrepresent himself or herself as a member or veteran of the United States Armed Forces or the National Guard while soliciting for charitable contributions.

⁴⁵ Section 496.415(6), F.S.

⁴⁶ Section 496.416, F.S. *See also*, s. 501.2075, F.S., providing that a person in violation of the Florida Deceptive and Unfair Trade Practices Act, is liable for a civil penalty of up to \$10,000 for each violation.

⁴⁷ Section 496.417, F.S.

⁴⁸ The court in *State v. Montas*, 993 So.2d 1127 (Fla. 5th DCA 2008), held that s. 250.43, F.S. was unconstitutional because of its overbreadth, which implicated 1st Amendment freedom of expression rights.

⁴⁹ *See* s. 817.30, F.S., pertaining to badges of the Grand Army of the Republic, the Military Order of the Loyal Legion of the U.S., the Military Order of Foreign Wars of the U.S., the Patrons of Husbandry, the Benevolent and Protective Order of Elks of the U.S.A., the Woodmen of the World, or of any society, order or organization of 5 years' standing in the state; s. 817.31, F.S., pertaining to a badge of the American Legion; and s. 817.311, F.S., pertaining to any badge or use of any name or claim to be a member of any benevolent, fraternal, social, humane, or charitable organization, which organization is entitled to the exclusive use of such name and such badge, button, insignia or emblem.

Any person, who commits an act prohibited in this section, commits a felony of the third degree.

Section 3 provides an effective date of October 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

First Amendment Freedom of Expression⁵⁰

Although the First Amendment of the U.S. Constitution protects speech, some conduct may be deemed a form of communication that falls within the ambit of the First Amendment speech. To determine whether conduct is speech protected by the First Amendment, one must look at the conduct that actually occurred and the context in which it occurred.

Conduct is expressive when the actor intends to communicate a particular message by his or her actions and that message will be understood by those who observe it because of the surrounding circumstances. The First Amendment perception and intent analysis to determine whether certain “speech” is constitutionally protected is not necessary when printed or spoken words, as opposed to symbolic expressions, are used. In determining whether conduct was “expressive conduct,” a court must ask whether a reasonable person would interpret it as some sort of message, not whether an observer would necessarily infer a specific message. Conduct that is ordinarily expressive may not be intended to express any message in some circumstances and therefore, would not be entitled to First Amendment protection.

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word, but it may not prohibit particular conduct because it has expressive elements. A law directed at the communicative nature of conduct must, like laws directed at speech itself, be justified by a substantial showing of need for that restriction, as required by the First Amendment.

Symbolic expression may be forbidden or regulated only if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. A

⁵⁰ This section of the analysis, concerning First Amendment implications, is synthesized from information provided in 16A Am. Jur. 2d Constitutional Law § 528.

governmental regulation is sufficiently justified, despite its incidental impact upon expressive conduct protected by the First Amendment, if it is within the constitutional power of the government; it furthers an important or substantial governmental interest; the governmental interest is unrelated to the suppression of free speech; and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

A court held in the case of *State v. Montas*, 993 So.2d 1127 (Fla. 5th DCA 2008), that s. 250.43, F.S., which prohibits a person who is not a member of the National Guard or U.S. Armed Forces from wearing the uniform or insignia of the National Guard or U.S. Armed Forces, was unconstitutionally overbroad and a violation of due process, because the law could implicate lawful behavior, including a person's free speech rights under the 1st Amendment of the U.S. Constitution. In *Montas*, Mr. Montas, who was arrested for violating s. 250.43, F.S., alleged that he was wearing the military uniform as an act of patriotism and to support members of his family in the military. The State alleged that Mr. Montas was wearing the uniform to circumvent security. The court noted that even if Mr. Montas' actions were not innocent, "where the asserted overbreadth of a law may have a chilling effect on the exercise of first amendment freedoms, a challenge will be permitted even by one who does not show that his own conduct is innocent and not subject to a narrowly drawn statute."⁵¹

The CS, should it become law, could be challenged under the 1st Amendment of the U.S. Constitution, or under article 1, section 4 of the Florida Constitution, as violation of free speech rights.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Should this CS become law, some charitable organizations may see a decrease in profits if their employees or volunteers are no longer able to misrepresent that they are members of the military or are no longer able to impersonate a military person by wearing military uniforms or insignia to solicit donations.

C. Government Sector Impact:

Because this CS creates a new felony crime, there may be an increase in government costs associated with arresting, prosecuting, and jailing persons committing the conduct prohibited under the CS.

VI. Technical Deficiencies:

None.

⁵¹ *Matos*, 993 So. 2d at 1130, FN2, citing *Bigelow v. Virginia*, 421 U.S. 809 (1975).

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

This CS differs from the bill in that the CS:

- Replaces the term “organized militia” with “National Guard” in sections 1 and 2, to clarify the restriction;
- Narrows the restriction from “commercial purposes” to “soliciting for charitable contributions”; and
- Deletes section 3, which provided an exemption from the penalties proposed by the bill.

B. Amendments:

None.