

**MILITARY LAW TASK FORCE
of the National Lawyers Guild**



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**THE LEGALITY OF COUNTER RECRUITMENT WORK:
ARE LAWS CRIMINALIZING COUNTER-RECRUITMENT EFFORTS LEGAL?**

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

Amendment I, The Bill of Rights

Counter-Recruitment activists and civilian military counselors have raised questions concerning the possible illegality of their counter-recruitment activity. While this leaflet only specifically addresses Florida statute § 250.52 (and its federal counterpart), the following analysis is applicable to any similar statutes purportedly “banning” activity intended to discourage young men and women from enlisting in the military.

THE BOTTOM LINE

The bottom line is that individuals undertaking counter-recruitment work should understand that while it is *theoretically* possible that their activities may expose them to criminal liability, it is *extremely* unlikely that any prosecutor would ever attempt to press charges—indeed, no one appears to have been charged under the Florida statute mentioned above. Nor is it very likely that such charges could withstand modern First Amendment / Free Speech scrutiny. There is a general consensus in the legal community—supported by practicing lawyers and even conservative legal scholars—that statutes like this are unconstitutional.

HISTORY OF THE FLORIDA STATUTE & ITS FEDERAL COUNTERPART

FLORIDA STATUE § 250.52

Over the summer of 2005, Florida statute §250.52 came to the attention of members of the Military Law

Task Force. The statute indicates that counter recruitment efforts in schools and elsewhere may expose counter recruitment workers to criminal liability. The statute is reprinted, below:

Florida statute § 250.52, Unlawful to persuade citizens not to enlist:

Whenever the United States is at war, or our foreign relations tend to indicate an impending war or state of war, *a person may not solicit or persuade a citizen of the United States not to enlist or serve in the Army, Air Force, Marine Corps, Coast Guard, or Navy, or in any reserve component thereof, or in the Florida National Guard, or publicly attempt to dissuade any such citizen from enlisting.* This section does not apply to the soliciting or persuading done by any person related by affinity or consanguinity to the person solicited or persuaded or whose advice is requested by the person solicited or persuaded. Any person who violates this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. [emphasis added]

§250.52 raised understandable questions among volunteers, particularly after additional research uncovered the fact that the statute had been amended as recently as 2003 (to upgrade the penalty from a second degree to a first degree misdemeanor). Additionally, four individuals were reportedly arrested under the statute in the years 1990, 1994, 1999, and 2000.

However, these were the only four arrests made since 1940, and no records indicate that these individuals were actually *charged* with a crime. Further research into the 2003 Amendments uncovered that the entire Military Chapter in Florida had been updated that year, to upgrade the penalties—from second degree to first degree misdemeanors—for all the violations mentioned in the section. No one seemed to actually assess the legality of § 250.52 during the amendment process: in the words of one military lobbyist who worked on the 2003 legislation (and who had never heard of anyone being prosecuted under the law), “[n] or was there any discussion about that provision... very little thought went into it.”

THE FEDERAL LAW: 18 U.S.C. § 2388

Concerns were also raised when a federal statute came to light, seeming to make it a felony to “obstruct” recruiting efforts. The statute is excerpted below:

18 U.S.C. § 2388 (a), Activities affecting armed forces during war: ...Whoever, when the United States is at war, willfully causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, *or willfully obstructs the recruiting or enlistment service of the United States,* to the injury of the service or the United States, or attempts to do so--Shall be fined under this title or imprisoned not more than twenty years, or both. [emphasis added]

Even more so than the Florida statute, however, this federal law has not been used to prosecute counter recruitment workers since World War II—and it was only successful once during that time, in 1943 (*U.S. v. Gordon*, 138 F.2d 174 (C.C.A.7 (Ill.) 1943)). Before that case, 18 U.S.C. § 2388 had not been used since the early 1920s...and the First Amendment right to free speech has evolved considerably since that time (see *The Right to Free Speech*, below).

This is all the more notable when considering some particularly provocative post-WWII acts of protest against military recruiting and enlistment—and the governments’ failure to employ 18 U.S.C. § 2388. For instance, “Stop the Draft Week,” which took place in 1967, involved thousands of protestors at an Oakland, California armed forces induction center. According to reports from the time, protestors, sitting

on the ground, “forced draftees to climb over them in order to get inside the building.” Additionally, “[a]s [inductees] entered they were handed leaflets asking them to change their minds, refuse induction and join the protests.” For a solid week, the area surrounding the Oakland induction center was turned into a battlefield between demonstrators and the Oakland Police Department.

Such behavior would clearly fall under the language in 18 U.S.C. § 2388, prohibiting obstructing “the recruiting or enlistment service of the United States.” Yet, of the several resulting court cases, all involve charges of either disorderly conduct, or violations of the Selective Service Law. The most prominent case resulting from the protest, the trial of the “Oakland Seven,” involved the indictment of seven defendants for “conspiracy [a felony] to commit the misdemeanors of trespass, creating a public nuisance, and resisting arrest, when demonstrators attempted to interfere with the activities of the Oakland Armed Forces Induction Center.” Ultimately, the Oakland Seven were acquitted—and 18 U.S.C. § 2388 was not used once.

The same argument applies to the current controversy over the Solomon Amendment. Over the course of ten years (from 1995-2005), Congress passed the Solomon Amendment and a series of extensions to the law, imposing tighter and stricter punishments against universities that implement “a policy of denying... the Secretary of Defense from obtaining for military recruiting purposes — (a) entry to campuses or access to students on campuses; or (b) access to directory information pertaining to students.” The Solomon Amendment and its progeny was Congress’ response to law schools’ policies denying employers (including the military) access to their campuses, where the employer does not abide by non-discrimination codes. The military’s “Don’t Ask, Don’t Tell” policy does not comport with most law schools’ anti-discrimination policy, and as a result, many law schools did not open their campuses to the military. This was a clear violation of the anti-recruiting and enlistment provisions of 18 U.S.C. § 2388. Once again, however, the government chose to employ a different law—in fact, to *create* one—the Solomon Amendment, rather than use 18 U.S.C. § 2388.

So there is a very strong likelihood that 18 U.S.C. § 2388, as applied to the obstruction of military recruiting, is in fact obsolete. The same can be said for F.S. § 250.52.

THE RIGHT TO FREE SPEECH vs. ANTI-CR STATUTES

ANTI-CR STATUTES ARE OVERLY BROAD & CONTENT-BASED

Statutes prohibiting CR work are likely to be found to be overly broad in their scope, because they include legally protected speech.

The only Supreme Court case discussing anti-CR law is from 1920—a time well before the evolution of modern day First Amendment law. The United States Supreme Court has never officially overruled the holding from 1920 (*Gilbert v. State of Minn.*, 254 U.S. 325 (1920)), which upheld the constitutionality of a Minnesota law making it a crime to unlawfully interfere with or discourage the enlistment of men in the military or naval service of the United States or of the state. However, in 1968, a New Jersey district court addressed a similar NJ law, and found that the Supreme Court’s *Gilbert* decision had been overruled informally, in light of more modern decisions (*Straut v. Calissi*, 293 F.Supp. 1339, 1344 (D.N.J. 1968)).

More importantly, the *Straut* court also stated that there “has been the erosion of the constitutional precepts upon which the *Gilbert* decision rested.” The court highlights *Gilbert*’s failure to address legal

points which would be crucial today, in any evaluation of First Amendment protection:

“The Gilbert Court failed to distinguish between advocacy of legal and illegal aims, or between that advocacy which amounts to the teaching of abstract doctrine and that which is aimed at stirring people to immediate, unlawful action.”

Additionally, the *Straut* court makes the excellent point that the NJ statute—as do the Florida and federal laws—proscribe lawful acts:

“Since it is certainly not a crime to choose not to volunteer one's services to the military, the statute prohibits the urging of lawful action.... Even were this kind of urging to reach the stage of 'vigorous advocacy,' it must be remembered that 'abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion.’”

The US Supreme Court's ruling in *Brandenburg v. Ohio* (395 U.S. 444 (1969)), while not directly addressing counter recruitment or anti-war efforts, also indicates that CR work would fall under constitutionally protected speech. *Brandenburg* and cases citing to it consider speech advocating *illegal* action, and they find that in most cases, it is protected. CR work encouraging men and women not to enlist fails to approach even that line, since volunteers are not telling potential recruits to do anything illegal.

In *Brandenburg*, the Court held that a member of the Klu Klux Klan could not be held criminally liable for advocating illegal action. The Court evaluated the Ohio Criminal Syndicalism statute, which made it a felony to “advocate ...the duty, necessity, or propriety crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.” In considering the statute, the Court found that it failed to distinguish mere advocacy from incitement to imminent lawless action, and as such it was be proscribed by the First and Fourteenth Amendments.

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

More convincing still, the Supreme Court has cited its main holding in *Brandenburg* as recently as 2003, thus making clear that the holding still stands.

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Virginia v. Black, 538 U.S. 343, 359 (2003); citing *Brandenburg*, 395 U.S. at 447.

As such, the majority—if not all—of the cases decided under the anti-recruitment provisions of a statute such as 18 U.S.C. § 2388 would today be considered outdated. This belief is also supported by constitutional scholars such as Professor Eugene Volokh, who writes that “the criminal punishment of antiwar speech [is] now generally seen as wrongly decided.”

ORGANIZATIONS THAT CAN HELP

Federal statute § 250.52 remains on the books, creating a chilling effect for those who wish to safely exercise their right to free speech. If you or anyone you know has ever been threatened under the guise of this or any similar statute, please contact members of the Military Law Task Force. (KathleenGilberd@aol.com, 619-233-1701 or mlhiken@pacbell.net, 415-566-3732)