

I. Statement of Facts

This memo is written in response to recent concerns raised on behalf of counter recruitment (CR) volunteers, regarding potential criminal liability stemming from their CR work.

Research is primarily focused on two criminal statutes:

1. Florida statute § 250.52, imposing liability for “persuading” an individual not to enlist;¹ and
2. Federal statute 18 U.S.C § 2388, proscribing the “obstruction” of military recruitment or enlistment.²

While other state statutes, similar to the Florida version, may still exist, none have been located.³ Regardless, an analysis of the constitutionality of F.S. § 250.52 and 18 U.S.C. § 2388 is believed to capture most of the legal questions and issues that a similar anti-CR statute would raise. Given the breadth of the topic, more general anti-sedition provisions of 18 U.S.C. § 2388, as well as the companion statute to F.S. § 250.52 (§ 250.51, making any “disloyal or insulting remark, or... any such sign, motion, or gesture” to or about

¹ 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.

² 18 U.S.C. § 2388 states the following, in relevant part... 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.

³ State statutes similar to F.S. § 250.52 were the product of litigation in the 1920s (in Minnesota) and in the 1960s (in New Jersey). What precisely happened to them after the litigation is unclear, but recent searches do not indicate that the statutes remain on the books.

Florida National Guard troops a misdemeanor), are not dealt with directly in this memo. Many of the arguments raised here, however, are also applicable to them.

Modern day relevance

Although statutes such as § 250.52 and 18 U.S.C. § 2388 were, for the most part, last used against counter-recruitment workers during World War I,⁴ they merit attention for two reasons. First, the United States Supreme Court has never officially overruled its previous holding in *Gilbert v. State of Minn.*, 254 U.S. 325 (1920), finding 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.⁵ Secondly, the Florida statute was amended in 2003, to increase the penalty from a second degree to a first degree misdemeanor.⁶ This, coupled with the fact that four individuals were arrested under § 250.52 between 1990 and 2000,⁷ indicates that attempts to use the statute are not inconceivable—at the very least as a tool of intimidation.⁸

⁴ In the case of 18 U.S.C. § 2388, one exception was found: The last time an individual was successfully charged with a violation of 18 U.S.C. § 2388, for instance, was in 1943 (*U.S. v. Gordon*, 138 F.2d 174 (C.C.A.7 (Ill.) 1943)—however, before that case, 18 U.S.C. § 2388 had not been used since the early 1920's. Two other cases were found to discuss the statute without commenting on its constitutionality: *Hartzel v. U.S.*, 322 U.S. 680 (1944) (holding that the prosecution had failed to show the requisite intent necessary for a conviction under 18 U.S.C. § 2388); and *United States v. Spock*, 416 F.2d 165 (1st Cir. Mass. 1969) (noting that certain of the defendant's acts—hindering or interfering with the nonrecruitment activities of the armed services—would not be covered by the statute employed by prosecutors (50 App. U.S.C. § 462(a)), and that it would be covered by the Espionage Act, 18 U.S.C. § § 2387, 2388(a), 2391, instead)(no other commentary on 18 U.S.C. § 2388 is made). Also, regarding F.S. § 250.52, there was a brief spate of activity under the statute between the years of 1990 and 2000, but these were the sole times anyone was arrested under it, and no evidence could be found that charges were actually pressed by the prosecutor. *See infra*, note 7.

⁵ *Gilbert v. State of Minn.*, 254 U.S. 325 (1920)

⁶ FL Staff Analysis, S.B. 684 (amending F.S. § 250.52), 4/15/2003.

⁷ Email correspondence with Mickey Finn, Florida Statistical Analysis Center, Florida Department of Law Enforcement (sent 9/17/2005).

⁸ There are also rumors circulating on the Internet, of recruiters using F.S. § 250.52 to intimidate teachers and counselors, although nothing has been substantiated at the time of this writing.

II. Question Presented

Can counter recruitment workers be held criminally liable, under either F.S. § 250.52 or 18 U.S.C. § 2388, for persuading an individual not to enlist, or otherwise similarly obstructing military recruitment and enlistment?

III. Short Answer

Theoretically, yes, although it is extremely unlikely that the state or federal government would press charges against an individual for “persuading” a potential recruit not to enlist, etc.—nor is it very likely that such charges could withstand modern First Amendment scrutiny.

IV. Discussion

1. The Pragmatic Argument: F.S. § 250.52 and related anti-recruiting provisions of 18 U.S.C. § 2388 are obsolete

A strong argument can be made that both F.S. § 250.52 and relevant provisions of 18 U.S.C. § 2388 are obsolete and would be found unconstitutional were they to be reviewed by a court today. The best evidence of this is the fact that no one has been charged by the government (state or federal) under either statute since the 1940s.⁹ This is all the more

⁹ See above discussion, *supra* notes 4, 7.

notable when considering some particularly provocative post-WWII acts of protest against military recruiting and enlistment—and state and federal governments’ failure to employ either F.S. § 250.52 or 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.¹⁰ Some protestors, sitting on the ground, “forced draftees to climb over them in order to get inside the building.”¹¹ Additionally, “[a]s [inductees] entered they were handed leaflets asking them to change their minds, refuse induction and join the protests.”¹² For a solid week, the area surrounding the Oakland induction center was turned into a battlefield between demonstrators and the Oakland Police Department.¹³ 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.” Several subsequent court cases cite to Stop the Draft Week, but they all involve charges of either disorderly conduct,¹⁴ or violations of the Selective Service Law.¹⁵ The most prominent case resulting from the protest, the trial of the “Oakland Seven,”¹⁶ 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

¹⁰ Homer Bigart, “264 Seized Here in Draft Protest,” *NYTIMES BOOKS* (Dec. 6, 1967), *available at* <http://www.nytimes.com/books/01/04/08/specials/ginsberg-arrested.html>.

¹¹ “BBC On this day: 16 October, 1967,” *BBC ONLINE*, *available at* http://news.bbc.co.uk/onthisday/hi/dates/stories/october/16/newsid_2535000/2535301.stm.

¹² “BBC On this day: 16 October, 1967,” *BBC ONLINE*, *available at* http://news.bbc.co.uk/onthisday/hi/dates/stories/october/16/newsid_2535000/2535301.stm.

¹³ Interview with Luke Hiken, Oct. 3, 2005.

¹⁴ *People v. Cagan*, 291 N.Y.S.2d 140 (N.Y. City Crim. Ct. 1968) (reversed on appeal, partially on First Amendment grounds).

¹⁵ *See, e.g., United States v. Gutknecht*, 283 F. Supp. 945 (D. Minn. 1968)

¹⁶ Not available via West Law or Lexis Nexis.

Forces Induction Center.”¹⁷ 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.¹⁸

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.”¹⁹ 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.²⁰ 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. Yet, once again, the government chose to employ a different law, the Solomon Amendment, rather than using 18 U.S.C. § 2388.²¹

¹⁷ Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U.L. Rev. 877 n.128 (1999)

¹⁸ Thanks to Prof. David Luban for raising this point.

¹⁹ Solomon Amendment I, National Defense Authorization Act for Fiscal Year 1995, Military Recruiting on Campus, 10 U.S.C. § 558.

²⁰ “Equality and Legal Education,” Solomonresponse.org, *available at* <http://www.law.georgetown.edu/solomon/commitment.html>. The American Association of Law Schools adopted AALS Bylaw 6-4 in 1990, forbidding discrimination based on sexual orientation. *Id.*

²¹ The fight over the Solomon Amendment will go before the United States Supreme Court this term. *Forum for Academic & Institutional Rights (FAIR) v. Rumsfeld*, 2004 U.S. App. LEXIS 24598 (3d Cir. N.J., 2004), is a case brought by a consortium of thirty-seven law schools and law faculty groups “whose mission is to promote academic freedom and to support educational institutions is opposing discrimination.” In November, 2004, the Third Circuit found the Solomon Amendment unconstitutional under the First Amendment and ordered the District Court to enjoin the law. The court’s decision has been stayed, pending review by the Supreme Court.

Thus, 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. While it is true that four individuals in Florida were in fact arrested under the state statute, there is no evidence that they were ever charged. Additionally, discussions with individuals closely involved with the 2003 amendments to § 250.52 indicate that those legislative changes were made without consideration for the specific statute or its modern day constitutionality. Florida's statutory chapter on Military Affairs was updated *en masse* in 2003, to increase *all* penalties contained therein from second degree to first degree misdemeanors.²² While an intimidation problem may certainly remain, it would not appear to indicate a serious likelihood of conviction for CR workers.

2. Case law indicating that Gilbert has been overruled, sub silentio: Straut v. Calissi

One can also argue that the Supreme Court has overruled *Gilbert*, *sub silentio*, given the Court's subsequent First Amendment jurisprudence. This argument was proposed most notably by one New Jersey District Court in *Straut v. Calissi* (293 F.Supp. 1339 (D.N.J. 1968)), which held that the state's anti-counter recruitment statute was unconstitutional. *Straut* is particularly on point for our purposes—although it is not controlling for the Florida or federal statutes—since it involved a statute virtually identical to F.S. § 250.52, which made acts “advocat[ing] that persons should not enlist in any of the armed forces of the United States” a misdemeanor.²³

²² Phone conversation with Lieutenant Colonel Elizabeth Masters, who, on behalf of the Florida Guard, helped the Florida Senate Military Affairs Committee update the state's Military Chapter (Sept. 28, 2005).

²³ That statute, N.J.Rev.Stat. § 2A:148-22 (which has not been reinstated), provides: 'Any person who: a. Prints, publishes or circulates any book, newspaper, pamphlet, or written or printed matter that advocates or

The court in *Straut* argues that

*...the Supreme Court has cited Gilbert only five times since the case was decided forty-eight years ago, and has discussed it only once, that being in a non-First Amendment context. It is thus more than merely arguable that the Court has sub silentio overruled the Gilbert holding.*²⁴

Yet this is not the only basis for the court's ruling. The court goes on to state, "[m]ore important, however, has been the erosion of the constitutional precepts upon which the Gilbert decision rested."²⁵ 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."²⁶

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

attempts to advocate that persons should not enlist in any of the armed forces of the United States, or of this state, or #b. Advocates or teaches, by word of mouth or otherwise, in any public place or at any meeting where more than 5 persons are assembled, that any person should not enlist in any of the armed forces of the United States of of this state; or c. Advocates or teaches that the citizens of this state should not aid, abet or assist the United States in prosecuting or carrying on war with the enemies of the United States-- Is guilty of a high misdemeanor.' N.J.Rev.Stat. § 2A:85-6 provides that punishment for a high misdemeanor shall be a fine of not more than \$2,000, or imprisonment for not more than 7 years, or both.'

²⁴ *Straut v. Calissi*, 293 F.Supp. 1339, 1344 (D.N.J. 1968). Even more interesting is the fact that modern Supreme Court cases citing to *Gilbert* cite to Justice Brandeis' *dissent*. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 446 (1990); *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 724 (1972); *Poe v. Ullman*, 367 U.S. 497, 552 (1961).

²⁵ *Id.*

²⁶ *Id.* at 1345.

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.'²⁷

These arguments are as valid today as they were in 1968.

3. Modern First Amendment jurisprudence—Brandenburg and the content-based approach

Lastly, the aforementioned arguments are all the more salient when read in the context of modern First Amendment jurisprudence. Perhaps most on-point is 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, the Court's holding that a member of the Klu Klux Klan could not be held criminally liable for advocating illegal action,²⁸ is nonetheless applicable to the concerns of counter recruitment volunteers. More convincing still, the Supreme Court has cited its main holding in *Brandenburg* as recently as 2003,²⁹ thus making clear that the holding still stands.³⁰

In *Brandenburg*, the Court evaluated the Ohio Criminal Syndicalism statute, which made it

²⁷ *Id.* at 1345, *citing* NAACP v. Button, 371 U.S. 415, 429 (1963).

²⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)

²⁹ "Furthermore, 'the 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.'" *Virginia v. Black*, 538 U.S. 343, 359 (2003); *citing* *Brandenburg*, 395 U.S. at 447.

³⁰ This principle was recently echoed in David Cole's book, *ENEMY ALIENS* (2003), where he noted that *Brandenburg's* speech protection included even the right to support terrorism. He wrote that "[c]itizens have a constitutional right to endorse terrorist organizations or terrorist activity, so long as their speech is not intended and likely to produce imminent lawless action" (citing *Brandenburg*). Cole, *ENEMY ALIENS*, at 65.

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.”³¹ 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 to be proscribed by the First and Fourteenth Amendments.³²

*[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.*³³

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 is especially true since, as the *Straut* court pointed out, individuals advocating resistance to war and to military enlistment would be supporting purely *legal* behavior.

Professor Eugene Volokh, a constitutional law scholar and expert on First Amendment jurisprudence, comes to a similar conclusion in his reading of the constitutionality of WWI anti-sedition statutes (including 18 U.S.C. § 2388). In his analysis of content-based speech restrictions, he writes:

[T]he Court has confronted many cases where a law was content-based as applied. In all those cases, either the Court held that the speech was constitutionally protected, or--if it held otherwise--the decision is now viewed as obsolete.

Consider, for instance, the World War I-era cases Debs v. United States, Frohwerk v. United States, and Schenck v. United States. These cases, which upheld the criminal punishment of antiwar speech, are now generally seen as wrongly decided. But the defendants' statements had violated a generally applicable provision of the Espionage Act, which barred all conduct--speech or not--that "willfully obstruct the recruiting or enlistment service of the United States, to the

³¹ Ohio Rev. Code Ann. s 2923.13.

³² *Brandenburg*, 395 U.S. at 448-49.

³³ *Id.* at 447 (emphasis added).

injury of the service or the United States."³⁴

Volokh goes on to state that:

*[U]nder modern First Amendment law, courts would overturn convictions for antiwar leafleting or speeches, and would treat the law as content-based, because it is the content of such antiwar speech that causes the interference with the draft... the premise of the retreat from Schenck, and of the adoption of the Brandenburg v. Ohio rule, is that the government must generally tolerate such advocacy even when the persuasiveness or the informational content of the speech can lead to eventual harm.*³⁵

No clearer statement could be made that 18 U.S.C. § 2388 lacks the constitutional backing to be effectively used against counter recruitment volunteers. The same holds true for F.S. § 250.52.

V. Conclusion

In sum, ample evidence exists to reassure individuals interested in counter recruitment of the constitutionality of their goal, as well as the means they are using to achieve it.

³⁴ Eugene Volokh, *Speech as Conduct: Generally applicable laws, illegal course of conduct, "situation-altering utterances," and the uncharted zones*, 90 CORNELL L. REV. 1277, 1287-88 (2005) (internal citations omitted).

³⁵ *Id.* at 1288, citing both case law and other constitutional scholars, in relevant part: *Carey v. Brown*, 447 U.S. 455, 465 (1980) (for the proposition that *Schenck* was an example of a case that involved a content-based distinction); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (plurality opinion) (same); and Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 Wm. & Mary L. Rev. 611, 645-46 (1992) ("noting that many of the cases cited above involved generally applicable laws, but arguing that the speech should nonetheless have been protected against those laws"); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 198-99 (1983) ("characterizing the law in *Schenck* as a "content-based restriction" that "prohibited expression critical of the war and the draft," though the portion of the Act that broadly prohibited such expression--as opposed to merely false information about the war--was generally applicable to conduct that obstructed the draft as well as to speech that obstructed the draft").