

AGAINST *RUMSFELD* DEFERENCE: Don't Let the "Fighting Constitution" Capture the Peacetime First Amendment

by Zac Morgan

Federal courts have increasingly rebuffed First Amendment challenges to state efforts to compel commercial speech or association by citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*¹ Courts have relied on *Rumsfeld* to answer objections to a mandate that drug companies attest a government-set price is "fair,"² a law barring social-media platforms from blocking content,³ restrictions on the sale of vitamin supplements,⁴ and municipal rules interfering with how third-party food-delivery services ask for tips.⁵

In short, *Rumsfeld*'s a ready citation when a court wants to characterize government mandates as merely "incidental" to an otherwise permissible regulation of conduct.⁶ No need to tailor state-backed ventriloquism or compelled association—a citation to *Rumsfeld* lifts that burden.

But *Rumsfeld* isn't a business case. It's a wartime one about Congress's powers to raise and support the armed forces—the parts of our founding document that former Chief Justice Hughes famously called the "fighting Constitution."⁷ Under the fighting powers, Congress is vested with immense and profound capacity to stand up a military for the Commander-in-Chief that has no analogy to regulating commercial speech.⁸

¹ 547 U.S. 47 (2006). To name a few: *Uber Techs., Inc. v. City of Seattle*, 168 F.4th 1202, 1214 (9th Cir. 2026); *NetChoice v. Paxton*, 49 F.4th 439, 458–62 (5th Cir. 2022); *vacated and remanded sub nom. Moody v. NetChoice*, 603 U.S. 707, 745 (2024); *Roswell v. Pettijohn*, 816 F.3d 73, 82 (5th Cir. 2016), *cert. granted, judgment vacated*, 581 U.S. 901 (2017); *Janssen Pharms. v. Kennedy*, 155 F.4th 245, 264 (3d Cir. 2025); *cert. denied* Case No. 25-749 (2026); *Ctr. for Responsible Nutrition v. James*, 159 F.4th 155, 166–67 (2d Cir. 2025); *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 108–09 (2d Cir. 2024); *DoorDash, Inc. v. City of New York*, 2026 WL 181657, at *4 (S.D.N.Y. Jan. 23, 2026).

² *Janssen*, 155 F.4th at 264.

³ *Paxton*, 49 F.4th at 458–62.

⁴ *Ctr. for Responsible Nutrition*, 159 F.4th at 166–67.

⁵ *DoorDash*, 2026 WL 181657, at *4.

⁶ *NetChoice*, 49 F.4th at 459 (quoting *Rumsfeld*, 547 U.S. at 64); *Janssen Pharms.*, 155 F.4th at 264 (Applying these principles to the Program, we have no trouble concluding that the Program is directed at conduct").

⁷ Charles Evans Hughes, *War Powers Under the Constitution*, 2 Marq. L. Rev. 1, 18 (1917) (emphasis omitted).

⁸ Congress may declare war, license privateers, set prize rules, raise and support armies for biennial periods, maintain a navy, and set the terms for the governance and regulation of the armed forces. It alone may provide the rules under which the armed body of the people—the militia—may be called upon to carry out the laws in time of insurrection or to repulse invaders. U.S. Const. art. I, § 8.

Zac Morgan is a Senior Litigation Counsel with Washington Legal Foundation.

Most significantly, Congress can compel military service—by plucking a man from an office job and placing him on a frontline halfway around the world with an obligation to kill. The fighting Constitution doesn’t supplant the guarantees of the Bill of Rights. But when Congress honestly invokes a core national defense prerogative, its acts are viewed by the courts through a glass of deference.⁹ As Hamilton put it, “[t]he idea of restraining the legislative authority, in the means of providing for the national defense, is one of those refinements which owe their origin to a zeal for liberty more ardent than enlightened.”¹⁰

But it’s dangerous to apply that same deference outside the fighting context. There’s good reason why the government carries a reduced burden when it raises and supports armies—but national security rationales don’t apply when state power is used for plainly peacetime purposes. Otherwise, as just one example, the rule that the Fifth Amendment’s just compensation requirement doesn’t apply to wartime confiscations of rebel property¹¹ would also apply to the regulation of raisin growing. That can’t be right—and it isn’t.¹²

Recall what was at stake in *Rumsfeld*. “On September 11, 2001, [al-Qaida] brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the Pentagon in Washington, D.C., and 40 in Pennsylvania.”¹³ A week later, “to prevent any future acts of international terrorism against the United States,” Congress authorized war, instructing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”¹⁴

It would have been constitutionally uncontroversial—“beyond question”¹⁵—to institute the draft to fight the war on terror. And it would have been equally uncontroversial—“beyond doubt”¹⁶—for the Supreme Court to prevent other Americans from directly interfering with (as opposed to merely opposing on policy grounds¹⁷) such a draft. As the Court held in *United States v. O’Brien*, “the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances.”¹⁸ So the symbolic burning of a draft card may be punished,¹⁹ even if the symbolic burning of the American flag cannot.²⁰ The stakes are different. When the fighting powers are threatened, the capacity of the Nation to defend itself is placed at risk. But when the government tries to criminalize wrongthink, it strikes against the freedoms that make the Nation worth fighting for.

⁹ *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

¹⁰ The Federalist, No. 26.

¹¹ *Miller v. United States*, 11 Wall. 268, 304–05 (1870).

¹² *Horne v. U.S. Dep’t of Agric.*, 576 U.S. 350, 370 (2015).

¹³ *Boumediene v. Bush*, 553 U.S. 723, 827 (2008) (Scalia, J., dissenting).

¹⁴ Authorization for Use of Military Force, Pub. L. 107-40 (Sept. 18, 2001).

¹⁵ *Lichter v. United States*, 334 U.S. 742, 756 (1948) (“The constitutionality of the conscription of manpower for military service is beyond question”).

¹⁶ *United States v. O’Brien*, 391 U.S. 367, 380 (1968).

¹⁷ *Cohen v. California*, 403 U.S. 15, 25–26 (1971).

¹⁸ 391 U.S. at 381.

¹⁹ *Id.* at 386.

²⁰ *Texas v. Johnson*, 491 U.S. 397, 420 (1989).

Rather than conscript service, the United States fought the war on terror—a worldwide conflict targeting “every terrorist group of global reach” and their state sponsors²¹—with an all-volunteer force. As the post-9/11 struggle expanded kinetically from Afghanistan to Iraq, while the U.S. simultaneously turned up the heat on Iran, Syria, and North Korea, successful recruitment became imperative. Congress needed to raise a sufficiently large force to handle both present commitments and potential contingencies.

Many of the Nation’s elite universities stood in the way. A substantial number of competent, military-age Americans can be found on campus. Yet for decades, many institutions of higher learning had banned or disfavored military recruiters to protest the United States’s then-policy barring gays and lesbians from service. Even before 9/11, Congress acted under the fighting Constitution to limit federal funds to universities that outright banned recruiters from campus.

But the protesting institutions refused to comply any further than legally necessary—merely allowing recruiters on property. A McKinsey recruiter might be promoted by university administration and given a room to discuss the merits of the consulting life, while a servicemember encouraging enlistments would garner, at best, second-class accommodations. So in 2004, with American forces waging counterterrorism campaigns around the globe and counterinsurgency operations in Afghanistan and Iraq, a wartime Congress passed a law ensuring “access to campuses . . . in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.”²²

The Forum on Academic and Institutional Rights (FAIR), a consortium of law schools and faculties, invoked the First Amendment against this effort to raise armies. FAIR characterized its claim as a compelled-speech case since, under the revised statute, schools that “send e-mails and post notices” to promote civilian recruiters must also do so “on behalf of the military to comply” with the equal-treatment rule.²³ In return, the Solicitor General didn’t mince words: “denying equal access” to recruiters “undermines the military’s recruitment effort, particularly in a time of War.”²⁴

So the stakes in *Rumsfeld* were quite high: Could academic institutions wall off students from recruitment? In a real sense, FAIR’s stance was a threat to the power to draft. After all, if a modicum of compelled speech can undo the Army and Navy Clauses, then surely the far greater infringement on liberty posed by conscription must also fall before the Bill of Rights.

No surprise then, that while the *Rumsfeld* Court discussed the First Amendment, it didn’t seriously apply it. Instead, the Court declared that it could not “ignore the purpose of this legislation when determining its constitutionality.”²⁵ And when Congress raises armies, “judicial deference is at its apogee.”²⁶ Such obeisant review rejected FAIR’s compelled-speech claim. Surely the same constitutional power that lets Congress send a man to kill in a foreign land permits the modest imposition that a college officer must hit send on an campuswide email noting that a “U.S. Army recruiter will meet interested students in Room 123 at 11 a.m.”²⁷

²¹ President George W. Bush, *Address to a Joint Session of Congress* (Sept. 20, 2001).

²² Pub. L. 108-375 (Oct. 28, 2004) (internal quotation marks omitted).

²³ *Rumsfeld*, 547 U.S. at 61.

²⁴ Pet. Br. 17, *Rumsfeld v. Forum for Acad. & Inst. Rts.*, 547 U.S. 47 (U.S. July 19, 2005) (capitalization in original).

²⁵ *Rumsfeld*, 547 U.S. at 58.

²⁶ *Id.* (internal ellipses, quotation marks, and citation omitted).

²⁷ *Id.* at 62.

That's sensible. But *Rumsfeld* deference is a rule for wartime, not all time. When courts pick up *Rumsfeld* to bless a government's efforts to compel speech or association in the commercial context, they remove the case from its fighting soil. Whether they do so knowingly or unknowingly, every citation to *Rumsfeld* loads the dice for the government—treating a warning label with the unusual deference Congress commands when it procures personnel for the armed forces.

The fighting powers of the Constitution are for fighting. To keep it that way, *Rumsfeld* deference must have no purchase on the First Amendment's application to the figurative marketplace of ideas or the literal marketplace where goods and services are exchanged for money. There, deference is owed not to the government, but to a plaintiff's demand for liberty.