

The Selective Service and Training Act of 1940

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that the public may have ready means of information as to the personal or financial responsibility behind the fictitious name.¹⁸ Some state statutes provide that a partnership may not maintain an action on a contract if it has not complied with the filing statute.¹⁹ These statutes do not apply to tort actions.²⁰ In some states there exist statutes requiring that only trading partnerships shall record.²¹ The New York Legislature has exercised the widest power in requiring *all* partnerships to file with the county clerk a certificate setting forth the partnership name and the names and addresses of all the individual partners.²²

The legislature evidently found that the "fictitious name filing statute" did not render sufficient protection to persons dealing with partnerships since many partnerships have true names which are incomplete designations. By requiring all partnerships to file an opportunity is given to a person, contracting with the partnership, to determine exactly with whom he is dealing. If one desires to bring an *ex delicto* action against a trading or nontrading partnership, he may sue the partners jointly or severally.²³ The filing statute protects this choice given the plaintiff by making it rather simple to determine who the partners are if the plaintiff wants to sue the partners jointly. The statute is not unconstitutional as forbidding the transaction of business.²⁴ It merely requires filing and provides a proper penalty for any violation thereof. Although not a creature of the state, as is a corporation, a partnership has become subject to much state regulation in recent years in an effort to prevent any evils which may arise when two or more persons associate for the purpose of transacting business.

CATHERINE GREENFIELD.

THE SELECTIVE SERVICE AND TRAINING ACT OF 1940.—Congress, exercising the power vested in it by the Federal Constitution,¹ recently passed the first peacetime statute conscripting the nation's

¹⁸ 45 A. L. R. 203 (1926).

¹⁹ *Melcher v. Beeler*, 48 Colo. 233, 110 Pac. 181 (1910); *Ryder-Gouger Co. v. Garretson*, 53 Wash. 71, 101 Pac. 498 (1909); *Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 108 Pac. 596 (1910).

²⁰ *Melcher v. Beeler*, 48 Colo. 233, 110 Pac. 181 (1910).

²¹ 2 ROWLEY, MODERN LAW OF PARTNERSHIP (1912) 1237.

²² N. Y. PENAL LAW § 440-b.

²³ N. Y. PART. LAW § 26.

²⁴ *Kusnetzky v. Security Ins. Co.*, 313 Mo. 143, 281 S. W. 47 (1926).

¹ U. S. CONST. Art. I, § 8 ("The Congress shall have the power . . . to declare war . . . to raise and support armies, . . . to make rules for the government and regulation of the land and naval forces; . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers").

manpower for military training purposes. The likelihood of the Act being declared unconstitutional is remote, for the spirit and aim of the present legislation is similar to that of the 1917 Conscription Statute² which was upheld in the Selective Draft Cases.³ It seems probable that the 1940 measure will be viewed in substantially the same manner. This question has already arisen in the lower courts. The constitutionality of the statute was upheld in *United States v. Cornell*,⁴ wherein the court held that the instant legislation was within the implied powers of Congress. In *United States v. Rappaport*⁵ defendant contended that the United States Supreme Court decisions upholding the 1917 Statute as constitutional were not applicable in construing the instant legislation, inasmuch as it was passed when the country was not at war. The court rejected this contention, holding that the Supreme Court in referring to the emergency then existing, did not limit the exercise of the power only to a period in which the country was at war.

The present statute is an attempt on the part of Congress to set up a system for the training of the male citizenry of the nation so as to provide the United States with a standing army and reserve force adequate to meet any exigencies which may arise in the future. The Act has as its avowed purpose, first, as declared in the preamble⁶ "that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service", and secondly, that this selection shall be so conducted as to disrupt in as least a manner as possible the normal economic life of the nation and the individuals affected thereby. The first requirement is that those male citizens within the specified age limits must register at the times set forth under the regulations of the Act.⁷ By this provision, Congress is not merely supplied with data whereby it is enabled to select those available for service, but a comprehensive census is thereby made of the physical fitness and occupational skills of that part of the population who, in time of war, bear the brunt of the military effort. Selection of trainees is accomplished by the local boards who are of necessity vested with a great amount of discretion. Their determination as to occupational deferment and physical fitness is subject to review by local appeal boards. As a final recourse an appeal may be

² 40 STAT. 76, 50 U. S. C. A. § 226 (1917).

³ 245 U. S. 366 (1917).

⁴ 36 F. Supp. 81 (1940).

⁵ U. S. Dist. Ct., S. D. N. Y. (Jan. 21, 1941).

⁶ Selective Training and Service Act of 1940, Public Act No. 783, 76th Congress, became a law Sept. 16, 1940 (hereinafter referred to only by section).

⁷ § 2.

See *Stone v. Christensen, et al.*, U. S. Dist. Ct. for Dist. of Oregon (Dec. 23, 1940) (the court held that the registration requirement under the Act was duty properly imposed by Congress by virtue of the powers delegated to it by the Federal Constitution).

taken to the President.⁸ In view of the amount of discretion vested in the local board it appears that the only co-ordinating factors are the regulations promulgated by the President⁹ and the rules and instructions emanating from the director of Selective Service. Any registrant dissatisfied with his classification may apply to the appeal board for reclassification,¹⁰ but "he may not introduce any new evidence not already contained in his file unless the board member or members consent."¹¹ The registrant may appear in person before his local board, but "no registrant may be represented before the local board by an attorney."¹² He has no right to appear either in person or otherwise before the appeal board, nor may he introduce oral testimony or witnesses.¹³ Inasmuch as the review of the appeal board is thus limited, it is evident that as a practical matter the registrant must depend upon the uniformity and fairness of his local board rather than the more nebulous protection of the appeal board. Failure to register, report for induction upon notification, or to otherwise fail to comply with the Act or interfere with its operation subjects the individual to criminal penalties ranging up to imprisonment for five years or fine of \$10,000 or both.¹⁴ The present legislation, however, differs from the 1917 Statute in that the person failing to obey cannot be subject to the rigors of military law until actually inducted into the armed forces.¹⁵ At the completion of his training period, the individual must once again relocate himself in some gainful occupation. The Act assists him in this by providing that upon his discharge he shall, if his superiors see fit, be given a certificate attesting to his satisfactory completion of training and service.¹⁶ Then, armed with this certificate and if still qualified to perform the duties of his former position, he may apply within forty days for reinstatement to the job which he held before induction.¹⁷ If the position was in the employ of a private employer the latter must restore the individual to the said position or to a position of like seniority, status and pay, unless his circumstances have so changed as to make it impossible or unreasonable for him to do so.¹⁸ The employee is to be considered as having been on furlough and is thereby entitled to such benefits, *e.g.*, insurance, offered by the employer as a part of his established rule or practice.¹⁹ If the employer refuses to re-employ or extend any benefit which his former

⁸ § 10(a)2.

⁹ § 10(a)1, 2.

¹⁰ SELECTIVE SERVICE REGULATIONS § 370.

¹¹ SELECTIVE SERVICE REGULATIONS § 369.

¹² *Ibid.*

¹³ SELECTIVE SERVICE REGULATIONS § 374(c) ("In reviewing an appealed classification . . . the board of appeals shall consider only the evidence submitted to it by the local board").

¹⁴ § II.

¹⁵ *Ibid.*

¹⁶ § 8(a).

¹⁷ § 8(b).

¹⁸ § 8(b)B.

¹⁹ § 8(c).

employee is entitled to, the latter may request the United States District Attorney to petition the District Court of the United States for a hearing. The court has the power to require the employer to reinstate the employee and to compensate him for loss of wages suffered by the employer's failure to comply with the mandate of the statute.²⁰ However, since the District Attorney need not appear for the employee unless satisfied of the reasonableness of his claim, it would seem that in the event assistance is there refused, he must engage an attorney at his own expense and take solace in the knowledge that costs cannot be imposed against him whether or not his petition is granted.

Assuming that the employer cannot reasonably reinstate the employee in his former position but has available a like or lesser position for which the employee is qualified, the question arises as to whether the court can order the employer to place the employee in the said position. Probably the courts will not hesitate to declare themselves possessed of discretionary power to so order the employer. The job protection provisions of the Act will be extended to those men who volunteer for training before being called for induction.²¹

"Any person . . . who knowingly consuls, aids or abets another to evade registration or service in the land or naval forces or any of the requirements of this act, or of said rules, regulations and directions" ²² thereby commits a crime and is punishable in accordance with the penal provisions of the statute. This section is undoubtedly necessary to insure the efficient operation of the training program. It has been stated by some that within the broadness of its language there may exist a potential threat to the right of free speech. It has also been urged that statements and expressions of opinion, otherwise freely voiced in a democratic nation, may under the stress of war hysteria and patriotic fervor be construed as violative of this section. The judiciary should feel itself charged with the duty of preserving this vital civil liberty by a fair and democratic interpretation of the clause above quoted.

The Act appears adequate as a whole to perform its expressed purpose of supplying the nation with a military force for national defense. The regulations so far issued evidence the desire of those charged with its administration to effect its operation in a manner most harmonious with our democratic institutions and least disruptive of the economic life of the individual. Members and students of the legal profession, in particular, should take a keen interest in this legislation and its operation, inasmuch as it represents, to many, the keystone of our efforts to insure the perpetuation of a "government by laws" and "not a government by men".

ALEXANDER VITALE.

²⁰ § 8(e).

²¹ Selective Service System Release No. 100 dated Nov. 7, 1940.

²² § II.