

October 1970

Armed Forces - Selective Service - Operation of Statute of Limitations as a Bar to Prosecution For Failure to Register For Draft. *Toussie v. United States*, 90 S. Ct. 858 (1970)

Susan B. Cocke

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Military, War, and Peace Commons](#)

Repository Citation

Susan B. Cocke, *Armed Forces - Selective Service - Operation of Statute of Limitations as a Bar to Prosecution For Failure to Register For Draft. Toussie v. United States*, 90 S. Ct. 858 (1970), 12 Wm. & Mary L. Rev. 122 (1970), <https://scholarship.law.wm.edu/wmlr/vol12/iss1/9>

Copyright c 1970 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

CURRENT DECISIONS

Armed Forces—SELECTIVE SERVICE—OPERATION OF STATUTE OF LIMITATION AS A BAR TO PROSECUTION FOR FAILURE TO REGISTER FOR DRAFT.
Toussie v. United States, 90 S. Ct. 858 (1970).

In 1967, the petitioner, Robert Toussie, was convicted for his failure to register for the selective service system draft eight years earlier.¹ The district court held that since Toussie was under a continuing duty to register,² his failure to do so constituted an offense of a continuing nature; and therefore, was not barred by the applicable statute of limitation.³ In affirming, the Court of Appeals for the Second Circuit⁴ rejected the petitioner's arguments that not only should the statute of limitation bar the prosecution, but that a conviction would violate his fifth amendment right against self-incrimination.⁵ To have registered late, he argued, would have subjected him to criminal prosecution.⁶

1. *United States v. Toussie*, 280 F. Supp. 473 (E.D.N.Y. 1967).

2. Universal Military Training and Service Act, 50 U.S.C. APP. § 453 (1964), which defines the duty involved, states in part:

. . . it shall be the duty of every male citizen of the United States, and every other male person now or hereafter in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

Under authority granted the President in 50 U.S.C. APP. § 460 (1964), Selective Service System Regulation, 32 C.F.R. § 1611.7(c) (1970) provides:

The Duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.

50 U.S.C. APP. § 462(a) (1964) establishes the offense involved when any person charged with the duty of carrying out the provisions of section 453 “. . . shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses registration or service in the armed forces. . . .”

3. 18 U.S.C. § 3282 (1964) provides that the general five year statute of limitations is applicable unless otherwise expressly provided by law.

4. *United States v. Toussie*, 410 F.2d 1156 (2d Cir. 1969).

5. U.S. CONST. amend. V.

6. Petitioner relied on recent Supreme Court decisions reversing convictions based upon registration requirements held violative of the fifth amendment right against self-

In reversing, the Supreme Court determined that the failure to register was not a continuing offense,⁷ but that the offense was completed at the expiration of the five day period after petitioner's eighteenth birthday.⁸ The Court concluded that prosecution for the offense was, therefore, barred by operation of the statute of limitations.⁹ In so holding, the Court ruled that the concept that the duty to register is a continuing one was not to be determinative of the nature of the offense.¹⁰ On the contrary, the judicial interpretation of the statute¹¹ was to be the primary inquiry, aided by the presumption that an offense is not a continuing one.¹²

The issue of whether failure to register for the draft is a continuing offense has not been frequently litigated,¹³ although the concept of an offense being a continuing one has been extended to numerous other acts.¹⁴ With the exception of a single precedent in 1923, which is dis-

incrimination: *Marchetti v. United States*, 390 U.S. 39 (1968) (failure to register as a gambler); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965) (failure to register as a member of the Communist Party).

7. *Toussie v. United States*, 90 S. Ct. 858 (1970).

8. Proclamation No. 2799, July 20, 1948, 62 Stat. 1531 continued after the Universal Military Training and Service Act by Proclamation No. 2942, August 30, 1951, 65 Stat. c35 provides at 62 Stat. 1532 that "[p]ersons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter."

9. 18 U.S.C. § 3282 (1964). Robert Toussie was born in 1941 and was required to register in 1959 on his eighteenth birthday or within five days thereafter. He did not do so, and at the end of the five days the statute of limitations began to run. In 1964, the five year statute of limitations operated to bar prosecution for Toussie's failure to register. The attempted induction which led to his conviction took place in 1967. Thus, the practical effect of the Court's ruling limits prosecution to a five year period, instead of the thirteen years that would be available if the offense were a continuing one. 90 S. Ct. at 859.

10. 90 S. Ct. at 862.

11. 50 U.S.C. APP. § 453 (1964).

12. 90 S. Ct. at 863. See MODEL PENAL CODE § 1.07, Comment (Tent. Draft No. 5, 1956) which states, citing *Fogel v. United States*, 162 F.2d 54 (5th Cir. 1947) with disapproval,

The draft in effect provides a presumption against a finding that an offense is a continuing one for purposes of time limitations. The assumption is that the continuing offense exception too freely applied is inconsistent with the purpose of time limitations.

13. *United States v. Toussie*, 410 F.2d 1156, 1157 (2d Cir. 1969).

14. 90 S. Ct. at 870-71 (dissenting opinion) which states that the concept has been extended to ". . . embezzlement, conspiracy, bigamy, nuisance, failure to provide support, repeated failure to file reports, failure to register under the Alien Registration Act, failure to notify the local [draft] board of a change in address. . . ."

tinguishable on its facts from the present controversy,¹⁵ all prior cases had held that failure to register for the draft was a continuing offense because of the continuing duty to register provided for in the pertinent legislative acts.¹⁶ Prior to *Toussie*, the leading decision declaring failure to register a continuous offense, *Fogel v. United States*,¹⁷ had been criticized as being inconsistent with the purposes of the statutes of limitation.¹⁸

In *Toussie*, the Court has erected "an absolute bar to finding a continuing offense in the absence of express statutory language."¹⁹ Not only has the prior rule as to the nature of the offense of failing to register for the draft been totally reversed, but a new rule of statutory construction, applicable to all other areas in which the continuing nature of an offense is in issue, has been advanced.

SUSAN BUNDY COCKE

15. *United States v. Salberg*, 287 F. 208 (N.D. Ohio 1923), which held that the duty to register under the Selective Service Act of May 18, 1917, ch. 15, § 5, 40 Stat. 76, 80 was specified for one day, June 5, 1917. Thus, failure to register was not a continuing offense.

16. *See, e.g., Fogel v. United States*, 162 F.2d 54 (5th Cir.), *cert. denied*, 332 U.S. 791 (1947). *But see* the minority opinion in the *Fogel* case in which Judge Sibley states:

His offense was complete at the expiration of the time fixed by the proclamation. Though there was a continuing duty to register, a subsequent registration would not have cancelled, but would only have mitigated the completed crime. . . . The theory of his conviction is that by doing nothing he renewed his crime every day to the date of the trial; which amounts to saying there is no statute of limitations for this offense. This seems to me not to be in accord with authority, when the thing that is made a crime is the failure to perform a continuing duty, when nothing at all happens after the crime became complete.

Id. at 56, citing *United States v. Irvine*, 98 U.S. 450 (1878) (where the Court held that, although the duty to pay pension money was a continuing one, the offense was complete when the wrongfulness of the withholding first became evident), and *Warren v. United States*, 199 F. 753 (5th Cir. 1912) (where the court held that the offense of a bankrupt concealing funds from his trustee, although the duty of disclosure was a continuing one, was not itself continuing). *Accord, Gara v. United States*, 178 F.2d 38 (6th Cir. 1949), *aff'd* by an equally divided Court on another point, 340 U.S. 857 (1950); *McGregor v. United States*, 206 F.2d 583 (4th Cir. 1953). *Cf. United States v. Guertler*, 147 F.2d 796 (2d Cir. 1945).

17. 162 F.2d 54 (5th Cir.), *cert. denied*, 332 U.S. 791 (1947).

18. *See* MODEL PENAL CODE § 1.07, Comments (Tent. Draft No. 5, 1956); Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 644-45 (1954).

19. 90 S. Ct. at 871 (dissenting opinion).