

**MEMORANDUM OF LAW  
ON THE CONSTRUCTION  
OF SECTION 10 OF  
THE FEDERAL PENAL CODE**

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Memorandum of Law on the Construction of Section 10 of the Federal Penal Code by Charles Warren

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**CHARLES WARREN**

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*Supplement  
Charles Warren*

Memorandum of Law  
on the  
Construction of Section 10 of  
The Federal Penal Code

*By*  
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FEDERAL PENAL CODE, SECTION 10.

Whoever, within the territory or jurisdiction of the United States, enlists, or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, shall be fined not more than one thousand dollars and imprisoned not more than three years.

(2)

Rec. Dec. 10, 1915.

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SECTION 10 OF THE FEDERAL PENAL CODE.

GENERAL PURPORT OF THE STATUTE.

It is to be noted at the outset, that the provisions of the statute law with respect to the actions forbidden to persons recruiting or enlisting in the United States are more limited than are the obligations which a foreign nation itself owes to the United States as a neutral nation to refrain from actions derogatory to the sovereignty of the United States.

As was said by Attorney General Cushing, in 1855 (7 Op. Atty. Gen. 378, 380, 381) :

"It is further to be observed, in conclusion of this branch of the subject, that, whether the acts of the British minister and his agents, in recruiting troops within the United States, do or do not come within the technical provisions of the acts of Congress, is altogether immaterial to the question of international right, as between this Government and that of Great Britain. If, by ingenious evasions of the letter of a penal statute intended only for private malefactors, the British Government should, nevertheless, levy troops here, the fact of the statute being thus defeated and trampled under foot would serve only to augment the public wrong."

"But the radical absurdity is in assuming that a foreign Government may lawfully do on the territory of another Government, or cause to be done, anything whatever, which is not made penal by local statutes. This assumption is altogether groundless. The law of nations is international, not domestic or municipal; it is the *ensemble* of international conventions, usages, and received opinions, aided, in case of need, by the doctrines of abstract justice and of universal reason. It is not restricted to the bounds of acts of Parliament or acts of Congress. International right would be reduced to a singular condition, indeed, if it consisted of those things, and those things only, which, for consideration of international convenience, Great Britain or the United States may have happened to enact as law by means of their legislative assemblies."

"In truth, the statute in all these matters is of but secondary account. The main consideration is the sovereign right of the United States to exercise complete and exclusive jurisdiction within their own territory; to remain strictly neutral, if they please, in the face of the warring nations of Europe; and of course not to tolerate enlistments in the country by either of belligerents, whether for land or sea service. If there be local states to punish the agents or parties to such enlistments, it is well; but that is a domestic question for our consideration, and does not regard any foreign Government. All which it concerns a foreign Government to know is, whether we, as a Government, permit such enlistments."

And as stated by Secretary Marcy to Mr. Crampton, September 5, 1855 (*Moore's International Law Digest*, vol. II, p. 447):

"In authorizing a plan of recruitment, which was to be carried out in part within our territory, the British Government seems to have forgotten that the United States had sovereign rights as well as municipal laws which were entitled to its respect. For very obvious reasons the officers employed by Her Majesty's Government in raising recruits from the United States would, of course, be cautioned to avoid exposing themselves to the penalties prescribed by our laws, but the United States had a right to expect something more than precautions to avoid those penalties. They had a right to expect that the Government and officers of Great Britain would regard the policy indicated by these laws, and respect our sovereign rights as an independent and friendly power."

And by Secretary Marcy to Mr. Buchanan (*ibid*, p. 448):

"In his view of the question as to the rights of territory, irrespective of municipal law, Lord Clarendon is understood to maintain that Her Majesty's Government may do anything within the United States short of enlisting and organizing and training men as soldiers for the British Army with perfect respect to the sovereign rights of this country.

"This proposition is exactly the reverse of that maintained by this Government, which holds that no foreign power whatever has the right to do either of the specified acts without its consent. No foreign power can, by its agents or officers, lawfully enter the territory of another to enlist soldiers for its service, or organize or train them therein, or even entice persons away in order to be enlisted without express permission."

And by President Pierce in his annual message, December 31, 1855 (*ibid*, p. 447):

"\* \* \* It is our sovereign right that our territory and jurisdiction shall not be invaded by either of the belligerent parties for



the transit of their armies, the operations of their fleets, the levy of troops for their service, the fitting out of cruisers by or against either, or any other act or incident of war. And these undeniable rights of neutrality, individual and national, the United States will under no circumstances surrender."

Aside from the question of the duty imposed upon a foreign nation by international law, the statute of the United States makes it unlawful for any person "within the territory or jurisdiction of the United States,"

- (a) To enlist;
- (b) To enter himself;
- (c) To hire or retain another person to enlist;
- (d) To hire or retain another person to enter himself;
- (e) To hire or retain another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered

in the service of any foreign prince, State, colony, district, or people as soldier or as a marine or seaman.

It is to be noted that, in order to render one liable under the law, the enlistment or entering himself must be completed within the United States. Congress has not made it a crime to leave the United States with intent to enlist abroad.

As was said in *United States v. Hertz* (1855) 26 Fed. Cases No. 15357:

"The meaning of the law then, is this: that if any person shall engage, hire, retain or employ another person to go outside the United States to do that which he could not do if he remained in the United States, viz. to take part in a foreign quarrel; if he hires to go, knowing that it is his intent to enlist when he arrives out—to enlist and engage him, or carry him, or pay him for going, because it is the intent of the party to enlist; then the offence is complete within the section. *Every resident of the United States has a right to go to Halifax and there to enlist in any army that he pleases; but it is not lawful for a person to engage another here to go to Halifax for that purpose.* I trust I make myself sufficiently clear to the jury that they may comprehend the distinction. It is the hiring of the person to go beyond the United States, that person having the intention to enlist when he arrives out, and that intention known to the party hiring him, and that intention being a portion of the consideration before he hires him, that defines the offense." (p. 295.)

And numerous precedents establish the right of subjects of another nation to depart from this country individually or in groups or bands for the purpose of serving in foreign armies, so long as the

manner of their departure does not constitute a military expedition within the meaning of section 13 of the Penal Code. See *United States v. Hart* (1896) 74 Fed. 724; *United States v. O'Brien* (1896) 75 Fed. 900; *Wiborg v. United States* (1896) 163 U. S. 632.

Aside from any question of a municipal statute of the United States, The Hague Convention No. V (1907) relieves a neutral nation of any obligations as follows:

"ART. 6. The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents."

#### THE ORIGIN OF SECTION 10 OF THE FEDERAL PENAL CODE.

The original of section 10 of the Federal Penal Code was the Act of June 5, 1794, c. 50, sec. 2 (1 Stat. 381-383), which is substantially similar, but with the addition of the following provisos:

"*Provided*, That this shall not be construed to extend to any subject or citizen of a foreign prince or state who shall transiently be within the United States and shall on board of any vessel of war, letter of marque or privateer, which at the time of its arrival within the United States was fitted and equipped as such, enlist or enter himself or hire or retain another subject or citizen of the same foreign prince or state, who is transiently within the United States, to enlist or enter himself to serve such prince or state on board such vessel of war, letter of marque or privateer, if the United States shall then be at peace with such prince or state. *And provided further*, That if any person so enlisted shall within thirty days after such enlistment voluntarily discover upon oath to some justice of the peace or other civil magistrate, the person or persons by whom he was so enlisted, so as that he or they may be apprehended and convicted of the said offence; such person so discovering the offender or offenders shall be indemnified from the penalty prescribed by this act."

This Act by its terms (section 10) was to be in force for two years only. It was continued by the Act of March 2, 1797, c. 5 (1 Stat. 497), for two more years, and made permanent by the Act of April 24, 1800, c. 35 (2 Stat. 54). It was reenacted in section 2 of the Act of April 20, 1818, c. 88 (3 Stat. 447); and (without the above provisos) became R. S. section 5282.

A search of early English statutes discloses that the earliest source from which the American statute was derived was the Act of 13 Anne, c. 10, in 1713 (Statutes of the Realm, 1821, Reprint. 12 Anne, c. 11, in some editions), entitled "An act to prevent the listing Her Majesties subjects to serve as soldiers without Her Majesties license,"

enacted for the purpose of preventing enlistment of soldiers by the pretender to the throne, as appears from the following preamble:

“Whereas several ill-affected Persons, Subjects of the Crown of Great Britain, have lately in open Defiance of the Laws presumed traitorously to list divers of Her Majesties subjects within the Kingdoms of Great Britain and Ireland to serve the Person pretended to be Prince of Wales during the life of the Late King James the Second, and since his Decease pretending to be and taking upon himself the Stile and Title of King of England by the name of James the Third, as Soldiers to the great disturbance of the Peace of these Her Majesties Kingdoms. And whereas the like traitorous Practice may be more covertly carried on under Pretense of listing Her Majesties Subjects to serve as Soldiers under some Foreign Prince, State, or Potentate, For Remedy thereof, Be it enacted, etc.”

The act provided that:

“\* \* \* if any Subject of the Crown of Great Britain, from and after the First Day of August next, shall within the Kingdom of Great Britain or Ireland, or from and after the First Day of October next without the same, *list or enter himself or procure any Person* being a Subject of Her Majesty, Her Heirs or Successors, *to list or enter himself or hire or retain any Person* being a Subject of Her Majesty, Her Heirs or Successors, with an Intent to cause such Person to list or enter himself or procure any Person being a Subject of Her Majesty, Her Heirs or Successors, to go beyond the Seas or embark with Intent and in order to be listed to serve any Foreign Prince, State, Potentate, or Person whatsoever, as a Soldier without leave or license of Her Majesty, Her Heirs or Successors, first obtained for listing any of the Subjects of Her Majesty, Her Heirs or Successors, to serve any such Foreign Prince, State, or Potentate or Person as Soldiers under the Sign Manual of Her Majesty, Her Heirs or Successors, every such Person so offending being thereof lawfully convicted shall be taken, deemed and adjudged to be guilty of High Treason and shall suffer and forfeit as in Cases of High Treason.

“Provided always that no License shall be effectual to exempt any Person from the Penalty of this Act who shall list or cause to be listed or entred any of the Subjects of Her Majesty, Her Heirs or Successors, in the Service of the French King until after the said French King shall have disbanded, broke and dismissed all the Regiments, Troops or Companies of Soldiers which he hath or may have in His service consisting of the natural-born Subjects of the Crown of Great Britain.”

This act was to continue in force for three years from August 1 and to the end of the next Parliament.