This article was originally published in the *New York Law Journal: Commentary* on Wednesday, May 12, 2021. It can also be viewed at https://www.law.com/newyorklawjournal/2021/05/12/mandatory-national-service-from-the-political-frying-pan-and-into-the-legal-fire/ (subscription may be required)

Mandatory National Service: From the Political Frying Pan and Into the Legal Fire

By Steve Cohen

Mandatory national service may be an idea whose time has finally come. Last Sunday, The New York Times devoted its lead **editorial** to endorsing a program in which every young American would have to devote a year to some sort of non-military service. Significantly, it is an idea that is gaining support on both sides of the political aisle: Pete Buttigieg called for such a program during his presidential run; and just last week, a former White House advisor emailed me to say that several leading GOP presidential contenders are seriously considering including it in their campaign platforms.

The reason the Republican insider mentioned it to me is that I have been calling for mandatory national service since soon after 9/11. And in the past two years I have published a series of **articles** on what such a program might actually look like. In response to those articles, Americans have responded to the idea, quarreled with the details, and raised scores of legitimate questions and concerns.

People do seem ready for something that will help bridge the political divide, provide us with common cause, and give young people a shared experience. Interestingly, the articles have generated more "shares" than anything else I've written about. (A not insignificant measure inasmuch as I've written seven books, three best-sellers, hundreds of articles, and was only the second person ever to have Op-Eds in the New York Times and Wall Street Journal on the same day.) In short, this idea has traction.

Not surprisingly, when I asked people what they thought about mandatory national service, a common reaction was, "It depends on the details." So, for an article I wrote for The Hill, I crafted a rough plan and provided some detail. Then I had a national polling firm test the idea. They asked two different audiences—young people 18-22 years of age, and adults old enough to be their parents—what they thought of the specific idea. The proposal read:

"All citizens and permanent residents (Green Card holders) will be required to participate in an 18-month National Service program. Service can be started anytime between an individual's 18th birthday and their 22nd birthday. Service

shall include health care assistance, infrastructure/environmental repair, early childhood education programs, eldercare assistance, and military service. (Participation in the military option shall be voluntary.) National service participants shall receive free communal room, board and a minimal subsistence allowance. Participants shall receive $10,000 upon successful

completion of their service. People who fail to successfully complete their National Service obligation shall not be eligible for any federal student loan or mortgage guarantee program."

The results surprised and encouraged me. Fully 80% of young people ages 18-22 favored the mandatory national service program, and 88% of adults voted for approval as well. Several months later, I was invited to flesh out the **details** for the United States Naval Institute's Proceedings.

One of the most thoughtful responses came from a member of President Clinton's Cabinet, who detailed several implementation challenges. But his criticisms, which he generously agreed to debate further, surprisingly omitted one key area: legal challenges. Which is why I'm raising some of the legal questions here, with the hope that this community will consider those issues, raise others, and provide the rigorous analysis and debate such a far-reaching proposal deserves.

I see five immediate legal issues that need to be addressed:

(1) Is mandatory national service prohibited by the Constitution?

(2) Is it allowed by Congress?

(3) What should be the appropriate consequence for failing to serve?

(4) Should there be exemptions or accommodations based on religion, disability, or other grounds?

(5) What other legal issues are likely to emerge?

Is Mandatory Service Unconstitutional?

In *Butler v. Perry*, 240 U.S. 328, (1916), the court said that a Florida statute requiring able-bodied males to perform unpaid bridge and road work was allowed, and did not constitute "involuntary servitude" under the 13th Amendment. The court further recognized that there are "duties which individuals owe to the state, such as services in the army, militia, on the jury, etc." During World War II, the Fifth Circuit ruled on a case involving a conscientious objector's challenge to his imprisonment for refusing to report

to a designated camp for work of national importance under civilian direction. The court in *Heflin v. Sanford*, 142 F.2d 798 (5th Cir. 1944) decided against the prisoner, and said that the 13th Amendment had "no application to a call for service made by one's government according to law to meet a public need, just as a call for money in such a case is taxation and not confiscation of property."

More recently, with the introduction of mandatory community service into high school curricula, courts have considered challenges brought by students who opposed the imposition of a service-related prerequisite to graduation. In *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996), for example, the Second Circuit observed that:

"Courts have consistently found the involuntary servitude standard is not so rigorous as to prohibit all forms of labor that one person is compelled to perform for the benefit of another. The Thirteenth Amendment does not bar labor that an individual may, at least in some sense, choose not to perform, even where the consequences of that choice are "exceedingly bad.""

The court further explained that a "state may require an attorney to work pro bono … or a doctor who has accepted scholarship funds to perform pro bono services."

There have also been First Amendment challenges to mandatory community service requirements for high school students. In *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989 (3d Cir. 1993), the plaintiffs claimed that such a requirement violated their First Amendment right to refrain from speaking, arguing that "performing mandatory community service is expressive conduct because it forces them to declare a belief in the value of altruism." The court rejected the student's argument, explaining that "The gamut of courses in a school's curriculum necessarily reflects the value judgments of those responsible for its development, yet requiring students to study course materials, write papers on the subjects, and take the examinations is not prohibited by the First Amendment … The constitutional line is crossed when, instead of merely teaching, the educators demand that students express agreement with the educators' values."

Does Congress Have the Power To Require Mandatory Service?

Some 35 years ago, Richard Danzig and Peter Szanton wrote a book entitled *National Service: What Would it Mean?* It was the culmination of a four-year study funded by the Ford Foundation. The authors tapped an impressive array of advisors and consultants for input—including a young Congressman named Leon Panetta and a little-known Army Major General, Colin Powell. Their work still ranks as the single best resource for thinking

about national service.

The book addressed the question of Congressional authority candidly, and quoted Phillip Bobbitt, now a Columbia Law School professor with deep expertise in the subject matter. Mr. Bobbitt argued, "There is no explicit authority empowering Congress to coerce large scale labor … The power … to draft a civilian work force … is not one delegated to the United States by the Constitution."

Messrs. Danzig and Szanton argued, however, that Prof. Bobbitt "concedes that it may be constitutionally sound to establish national service on the basis of congressional authority to raise and support armies" to institute some sort of national mandatory service framework. "The positive consequences of the program for the volunteer military would give this reference force … and the courts are disinclined to look behind a congressional assertion of motive to challenge what a congressional judgment about what is necessary to and proper to conduct the nation's defense." In short, opponents will probably challenge the plan, but it will prevail.

What Should Be the Consequences for Failing To Serve?

One of the most commented upon aspects of my "trial balloon" plan was what the punishment should be for failing to complete one's service. Young people in particular have commented that the downside must have an equitable component: The consequences must be a concern to people from wealthy families—every bit as much as to people from low-income households. My original proposal—that people who fail to successfully complete their service should be denied federal student loans and home mortgages—was seen as inadequate. My subsequent article for Proceedings was modified to prohibit attendance at any college that received federal funds.

The Danzig/Szanton book devoted several pages to this question, and settled on a scheme that utilized an income tax that would be relieved upon completion. Given our recent experience with Obamacare's individual mandate penalty, I don't think a similar structure would pass court muster. Moreover, such a proposal would not have the same level of impact on individuals across the economic spectrum. But other than a civil penalty—rather than a criminal sanction—I'm not sure what the right consequences should be.

What Sort of Exemptions and Accommodations Are Appropriate?

These two dimensions of any proposed program—exemptions and accommodations—are opposite sides of the same coin. Most young people I've spoken with in recent years know very little about the war in Vietnam—or about World War I, World War II, or Korea for that matter. But they do seem to

know that the military was comprised disproportionally by young men from poorer families, many of them Black and Latino. Facing the draft, white, middle-class families with college-bound sons overwhelmingly knew how to game the system. (More than a few people commented on the need to prevent exemptions such as that secured by a young Donald Trump by a family doctor for foot spurs.) So, from political, policy, and equity perspectives, the default proposition should be: Everyone serves, in some capacity.

There ought to be no exemptions. But the program should allow for one concession available to everyone: People could begin their service at any time between their 18th and 22nd birthday. Some would choose to serve immediately after high school; others might want to take a break during college; and still others might choose to go to college first, graduate, and then serve. Such a spectrum of ages—and levels of maturity—would likely be a good thing. But there should be no deferments for those who might argue that service would interfere with their career plans. Athletes, musicians and doctors come to mind here, among others. An 18-month delay will not derail a career.

Because service would not be military in nature, all could serve with clear consciences and without exemptions. Undoubtedly, the service requirement will be tested on religious grounds.

A doctrine of maximum inclusion requires providing reasonable accommodations if we expect people with disabilities to serve. There is little question that this will be a challenge both in rulemaking and implementation. (And whatever decisions we make will become a focus of litigation—from all sides.) But because two of the goals of mandatory national service are to give young people a shared experience and exposure to people unlike themselves, a default towards inclusion will demand creativity some flexibility.

The Need for a National Dialogue

Just over 100 years ago, William James, the eminent philosopher, historian, and psychologist called for universal national service. In a speech James gave in 1906 at Stanford University, he argued that American youth be conscripted into "an army enlisted against *Nature*":

"[t]o coal and iron mines, to freight trains, to fishing fleets in December, to dishwashing, clothes-washing, and window-washing, to road-building and tunnel-making, to foundries and stoke-holes, and to the frames of skyscrapers would our gilded youths be drafted off, according to their choice, to get the childishness knocked out of them, and to come back into society with healthier sympathies and soberer ideas."

Today, it has become a cliché to say that rarely in our national history have we been more divided as a people. Yet it is true. Gone is the "loyal opposition." Now we treat those with whom we disagree as the enemy. Moreover, too many of us get our news only from sources that we agree with—rebuking alternative sources as "fake news." Compromise has become a dirty word, resentment of "others" is the norm, and the number of experiences we share as a people is dwindling.

National service may not fix these problems. But maintaining the status quo will certainly exacerbate them. James' speech and subsequent essay was called "The Moral Equivalent of War." It is an equally valid description of our needs for a plan of mandatory national service today.

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