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Federal Criminal Procedure-Subpoena of Nonresident Citizen as Witness Before Grand Jury

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FEDERAL CRIMINAL PROCEDURE—SUBPOENA OF NONRESIDENT CITIZEN AS WITNESS BEFORE GRAND JURY—Defendant, a nonresident citizen of the United States, was subpoenaed[1] by a federal district court to appear before a grand jury investigating alleged fraud in the procurement of government contracts. Defendant having failed to appear, the district court issued an order directing him to show cause why he should not be held in contempt. On appeal from a judgment holding defendant in contempt,[2] *held*, reversed, one judge dissenting in part. The power of a federal district court to subpoena a nonresident citizen is limited to the actual trial of a criminal action. *United States v. Thompson*, 319 F.2d 665 (2d Cir. 1963).

The effect of the redrafting of the Walsh Act[3] in the 1948 revision of the Federal Judicial Code was the sole issue of significance in the principal case. As enacted, the Walsh Act empowered the federal courts to subpoena

1 In conformity with the requirements of 28 U.S.C. § 1783(b) (1958), the subpoena was personally served on defendant by the American Vice-Consul in the Philippines, and a first-class round trip ticket and travel expenses tendered.

2 *In re* Thompson, 213 F. Supp. 372 (S.D.N.Y. 1963).

3 Walsh Act of 1926, ch. 762, § 2, 44 Stat. 835; Blackmer v. United States, 284 U.S. 421 (1932).

nonresident citizens as witnesses at the "trial of any criminal action."[4] Section 1783 of the revised Judicial Code permits the issuing of a subpoena for attendance at a "criminal proceeding."[5] While it is clear that the original provision was not intended to apply to a grand jury proceeding, the term "criminal proceeding" incorporated in the revision is arguably of wider scope.[6] Since the issue turns on a narrow question of statutory interpretation, initial consideration must be given to the revisers' notes which accompany the text of the Judicial Code. Commenting on the general policies under which the revisers worked, the chief reviser wrote:

> "[N]o changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed. Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised. Congress recognized this rule by including in its reports the complete Revisers' Notes to each section *in which are noted all instances where change is intended* and the reasons therefor."[7]

To understand the subtle significance of the chief reviser's statement, comparison must be made to the well settled rule of construction of revised statutes and codifications unaccompanied by explanatory notes. Changes in phraseology do not import a substantive change of law or policy "unless the intent of the legislature to alter the law is evident *or* the language of the new act is palpably such as to require a different construction."[8] The chief reviser would demand not only that the change of law be manifest in the language of the revision, but that it be specifically acknowledged in the notes. In the notes following section 1783 there is in fact no mention of the change in phraseology at issue. However, the original language of the Walsh Act succinctly and unambiguously limited the subpoena power of the federal courts over nonresident citizens to the actual trial of a

4 "Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States, or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending . . . may, upon a proper showing, order that a subpoena issue . . . commanding such witness to appear before the said court . . . ." Walsh Act of 1926, ch. 762, § 2, 44 Stat. 835.

5 "A court of the United States may subpoena, for appearance before it, a citizen or resident of the United States who . . . is beyond the jurisdiction of the United States and whose testimony in a criminal proceeding is desired by the Attorney General." 28 U.S.C. § 1783(a) (1958).

6 In two previous cases, a district court has exercised its alleged power under § 1783 to subpoena nonresident citizens before a federal grand jury, holding them in contempt upon failure to appear. United States v. Stern, No. M11-188, S.D.N.Y. 1957, *appeal dismissed*, 249 F.2d 720 (2d Cir. 1957), *cert. denied*, 357 U.S. 919 (1958); United States v. Leff, Docket 143/309, S.D.N.Y. 1954.

7 Barron, *The Judicial Code, 1948 Revision*, 8 F.R.D. 439, 445-46 (1949). (Emphasis added.)

8 Principal case at 669. (Emphasis added.) See United States v. Ryder, 110 U.S. 729, 740 (1884); Barron, *supra* note 7, at 446-48, and cases collected therein.

criminal action. The failure of the language employed in section 1783 to clarify the original in any way is apparent. The change in phraseology therefore cannot reasonably be characterized as merely an attempt at clarification.[9] Viewed with the original language of the Walsh Act in mind, the language of section 1783 clearly evidences an intention to increase the scope of the courts' subpoena power. At the same time, however, the revisers' notes purport to deny any such intention by omitting reference to the change in phraseology.

The majority opinion in the principal case avoided the ultimate issue by isolating the phrase "criminal proceeding."[10] By reference to decisions interpreting the phrase in other contexts,[11] and without reference to the original language of the Walsh Act, the court found the expression "criminal proceeding"—and thus the language of section 1783—"at best, ambiguous."[12] The absence of notation of the change in phraseology was thus deemed controlling.[13] Had the issue been properly framed in terms of a conflict between the results dictated by the language of section 1783 (viewed in the light of the Walsh Act's original language)[14] and the revisers' notes, the former would almost certainly have prevailed despite the chief reviser's contentions to the contrary.[15]

In evaluating the magnitude of the law enforcement problem created by the majority opinion, it is important to understand that, had its decision been otherwise, significant problems would nevertheless have remained. The Walsh Act is in its very conception inadequate, for law enforcement problems occasioned by a witness' flight beyond the territorial borders of the United States admit of solution only through the enlistment of foreign judicial aid, presumably by bilateral international agreement.[16] The Walsh Act, however, is unilateral in design. The United States has the power,

9 Principal case at 671 (dissenting opinion of Kaufman, J.).

10 *Id.* at 668.

11 *E.g., In re* Groban, 352 U.S. 330, 333 (1957); Post v. United States, 161 U.S. 583, 587 (1896); Mullony v. United States, 79 F.2d 566, 578-80 (1st Cir. 1935). *But see* Cobbledick v. United States, 309 U.S. 323 (1940); Hale v. Henkel, 201 U.S. 43, 66 (1906).

12 Principal case at 668.

13 *Id.* at 669-70.

14 *Cf.* Fourco Glass Co. v. Transmirra Corp., 353 U.S. 222, 228 (1956).

15 The revisers' notes are "authoritative in perceiving the meaning of the Code . . . ." United States v. National City Lines, 337 U.S. 78, 81 (1949). However, the absence of notation of changes in phraseology should not be conclusive of legislative intent where a substantive change is clearly reflected in the alteration of the statute itself. Though numerous cases have quoted approvingly from Barron, *supra* note 7, reference to the revisers' notes has been made only upon a determination that the language of the statute itself was ambiguous. *E.g.*, Fourco Glass Co. v. Transmirra Corp., *supra* note 14; Glenn v. United States, 231 F.2d 884 (9th Cir.), *cert. denied*, 352 U.S. 926 (1956). "[T]here is no need to refer to the legislative history where the statutory language is clear." *Ex parte* Collette, 337 U.S. 55, 61 (1948) (interpreting 28 U.S.C. § 1404(a) (1948)); see Continental Cas. Co. v. United States, 314 U.S. 527, 530 (1942); Bate Refrigerating Co. v. Sulzberger, 157 U.S. 1, 45 (1895); United States v. Bowen, 100 U.S. 508, 513 (1880).

16 See generally Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953); Mueller, *International Judicial Assistance in Criminal Matters*, 7 VILL. L. REV. 193 (1962).

inherent in its sovereignty, to require nonresident citizens to return to this country whenever the public interest demands.[17] In fact, reliance is placed solely on the coercive effect of the courts' subpoena power. Where the witness has no property in the United States to satisfy a contempt decree incident to his refusal to answer a subpoena,[18] that decree has little coercive effect. A more effective device might be statutory revocation of the passport upon failure to comply with a subpoena.

Nonetheless, within the present framework of the Walsh Act, the unavailability of nonresident citizens to testify before grand juries should occasion less frequent problems than might seem the case. The considerations applicable to the problem of securing witnesses before an investigating grand jury are wholly different from those applicable to the problem of securing witnesses before a trial court. The significance of the courts' subpoena power in the latter case arises from the right of confrontation which the sixth amendment affords the accused in a criminal prosecution and the rules regarding the admissibility of hearsay evidence. Hearsay *alone*, however, even where it would be clearly incompetent before a petit jury, can legally support a grand jury indictment where a witness possessed of immediate knowledge is unavailable to testify.[19]

Should Congress consider legislation remedial of the instance where a nonresident citizen is alone possessed of evidence indispensable to the securing of an indictment, provision might profitably be made for the taking of depositions or the issuing of letters rogatory[20] as a discretionary alternative to the courts' increased subpoena powers.[21] If and to the extent that foreign law permits such procedures,[22] provision might be made for cases in which the witness is unable to comply with a subpoena because of illness or substantial hardship.[23]

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17 Blackmer v. United States, 284 U.S. 421 (1932); *cf.* Blair v. United States, 250 U.S. 273, 281 (1918).

18 28 U.S.C. § 1784 (1958).

19 Costello v. United States, 350 U.S. 359 (1956).

20 While 28 U.S.C. § 1781 (1958) provides the procedure for the issuance of letters rogatory or a commission to take depositions, there exists no provision enabling federal courts to issue letters rogatory or take depositions for grand jury proceedings.

21 The validity of an indictment depends on the rational persuasiveness of the evidence before the grand jury, rather than on its trial competence. Costello v. United States, 221 F.2d 668, 677-79 (2d Cir.), *aff'd*, 350 U.S. 359, 364-65 (1956) (concurring opinion of Burton, J.). In view of *Costello* and the ex parte nature of grand jury proceedings, it seems doubtful than an indictment would be held to have been improperly returned if supported solely by evidence secured by deposition or letters rogatory, even where the sixth amendment right of confrontation would render such evidence incompetent before a petit jury. See generally Note, 62 HARV. L. REV. 111 (1948); Note, 65 YALE L.J. 390 (1956).

22 See Jones, *supra* note 16, at 518-34; Mueller, *supra* note 16, at 202-15.

23 As was alleged by the defendant in the principal case. Principal case at 666.