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Federal Criminal Procedure - Venue Situs of Crime of Failing to Perform Statutory Duty

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FEDERAL CRIMINAL PROCEDURE—VENUE—SITUS OF CRIME OF FAILING TO PERFORM STATUTORY DUTY—Three defendants, classified conscientious objectors, were prosecuted for violations of the Military Training and Service Act.¹ Defendants were ordered to report to their local boards for civilian work assignments in lieu of induction. They reported to their boards but refused to comply with instructions ordering them to report at hospitals located in judicial districts other than those of their boards. The Third Circuit held that the crime of “knowingly failing or neglecting to obey any such order”² was committed in the district where the hospital was located and that venue was proper in such district.³ On similar facts the Tenth Circuit had previously held that the crime was committed in the district where the draft board was located and venue was improper in any other district.⁴ On certiorari to the United States Supreme Court, *held*, Third Circuit affirmed, three justices dissenting. Defendants were required to report to the local board and to report for employment. The crime arises from a failure to complete the second duty, and the place fixed for its performance fixes the situs of the crime and determines the venue of the offense. *Johnston v. United States*, 351 U.S. 215 (1956).

The accused in a criminal case has the constitutional right to a jury trial “in the State where the said Crimes shall have been committed.”⁵ The basic question therefore is one of statutory interpretation as to where one who “knowingly fails or neglects to obey”⁶ the order of his local board has committed the offense. The answer would seem clear if defendants had proceeded to the hospitals and refused to work. Venue would then be in

¹ 62 Stat. 604 to 627 (1948), 50 U.S.C. App. (1952) §§451 to 470.

² 62 Stat. 609 (1948), 50 U.S.C. App. (1952) §456 (j).

³ *United States v. Johnston*, (3d Cir. 1955) 227 F. (2d) 745.

⁴ *United States v. Patteson*, (10th Cir. 1956) 229 F. (2d) 257.

⁵ U. S. CONST., art. III, §2; Amend. VI.

⁶ Note 2 *supra*.

the federal district court where the hospital was located.⁷ Similarly, if defendants had refused to report to their local boards venue would be proper only in the districts of the local boards.⁸ But where defendants reported to their local boards and then refused to perform the duty of reporting to their places of assignment, the answer is less clear. In such cases venue is usually determined by the general rule that the place established for the performance of the duty fixes the situs of the crime,⁹ as is the rule in state non-support cases.¹⁰ The holding in the instant case fixes venue where the duty was to be performed. Under a contrary view, a difficult problem could arise if defendants started to their places of assignment and in route decided not to report. If they had traveled through several judicial districts the place of commission of the crime (i.e., refusal to report) might be impossible to determine, and prosecution of offenders would be seriously impeded.¹¹ Also, if prosecutions can be brought in distant areas, defendants, because of inconvenience, distance, and expense, may be deprived of witnesses. Even if this were not true, defendants might be denied the benefit of the jury's knowledge of the reputations of witnesses testifying in their favor.¹² On the facts of the principal case, however, the frequency and extent of such inconvenience and unfairness is questionable,¹³ and the problem has gained but scant recognition in other cases where the crime has consisted of a failure to perform a duty in a distant location.¹⁴ Considera-

⁷ *United States v. Anderson*, 328 U.S. 699 (1946); *Gibson v. United States*, 329 U.S. 338 (1946).

⁸ *Humes v. Pescor*, (8th Cir. 1945) 148 F. (2d) 127; *Jones v. Pescor*, (8th Cir. 1948) 169 F. (2d) 853; *United States v. Van Den Berg*, (7th Cir. 1944) 139 F. (2d) 654.

⁹ *Accord*: *United States v. Lombardo*, 241 U.S. 73 (1916); *Rumely v. McCarthy*, 250 U.S. 283 (1919); *Bratton v. United States*, (10th Cir. 1934) 73 F. (2d) 795; *United States v. Commerford*, (2d Cir. 1933) 64 F. (2d) 28; *Yarborough v. United States*, (4th Cir. 1956) 230 F. (2d) 56; *New York Cent. & H. R.R. Co. v. United States*, (2d Cir. 1908) 166 F. 267; *United States v. Sutter*, (S.D. Cal. 1954) 127 F. Supp. 109. See *United States v. Anderson*, note 7 *supra*, at 704-705.

¹⁰ See cases cited in 6 *STAN. L. REV.* 709 at 710-711 (1954).

¹¹ See *State v. Jackson*, 187 Ind. 694 at 699, 121 N.E. 114 (1918). It further appears that the crime is not committed until the date for reporting has passed, since there is no specific duty to proceed at any time or place. This contrasts with the procedure during World War II whereby conscientious objectors and inductees were delivered by the government to places of assignment and induction. S.S. Regs. 652.1 to 652.13, 653.11 to 653.12, 651.2 to 651.10. This indicates that while proceeding under government direction was formerly a duty distinct from the obligation to report to the local board and place of assignment, such a duty does not exist today with reference to conscientious objectors. This argument clearly supports the majority opinion, i.e., that a refusal to report to the place of assignment, not a refusal to travel, is the essence of the duty which is violated.

¹² *United States v. Johnson*, 323 U.S. 273 at 276 (1944): ". . . [I]f an enactment of Congress equally permits the underlying spirit of the constitutional concern for [jury] trial in the vicinage to be respected . . . construction should go in the direction of the constitutional policy even though not commanded by it." See Connor, "The Constitutional Right to a Trial by Jury of the Vicinage," 57 *UNIV. PA. L. REV.* 197 (1909).

¹³ See Brief for United States in Supreme Court for principal case at 53-54 to the effect that conscientious objectors are not ordered out of the United States against their will and are not usually ordered to leave their own state.

¹⁴ See note 9 *supra*.

tions of convenience to the prosecution and fairness to the defendant in these cases could be effectively resolved by permitting a transfer to the place of refusal upon defendant's motion showing a greater convenience to the witnesses, parties and the court.¹⁵ It is within the power of the Supreme Court to prescribe such a change in the Federal Rules of Criminal Procedure.¹⁶ Particularly in light of the strong opinion of the dissenting members of the Court, it would seem that such a change in federal procedure would provide a definitive situs of the crime, and would at the same time remove the serious possibility of infringement of defendant's right to a fair jury trial.

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¹⁵ See Blume, "The Place of Trial of Criminal Cases: Vicinage and Venue," 43 MICH. L. REV. 59 (1944).

¹⁶ 18 U.S.C. (1952) §3771.