University of Michigan Journal of Law Reform

Volume 4

1971

Title III - Recalcitrant Witnesses

Jeffrey J. Greenbaum
University of Michigan Law School

TITLE III – RECALCITRANT WITNESSES

I. CODIFICATION OF PRESENT PRACTICE

This title represents a congressional attempt to codify the court-developed[1] civil contempt practice.[2] When a witness is granted immunity and still refuses to answer the question presented to him he can be ordered by a court to answer the specific question.[3] Upon his continued refusal, a court can have him confined summarily until he complies with such order, or until he is no longer able to comply.[4] Such confinement is not intended to be punitive in nature,[5] but rather to coerce compliance with the court's order by imposing imprisonment as an alternative to answering the question.[6] The witness will be released from confinement as soon as he is willing to obey the court order.[7] Consequently, he is said to carry "the keys of [his] prison in [his] own pockets."[8] Since the confinement is based on the witness' refusal to comply, however, he may not be jailed after it is impossible for him effectively to carry out the court's order, *i.e.*, after the relevant proceeding has terminated.[9] As a result of the purpose of the

---

[1] "There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." Shillitani v. United States, 384 U.S. 364, 370 (1966); *See also In re* Loughran, 276 F. Supp. 393, 401 (C.D. Cal. 1967); *In re* Lazarus, 276 F. Supp. 434, 447, 449 (C.D. Cal. 1967).

[2] H.R. REP. NO. 91-1549, 91st Cong., 2d Sess. 46 (1970) [hereinafter cited as HOUSE REPORT]; S. REP. NO. 91-617, 91st Cong., 1st Sess. 148 (1969) [hereinafter cited as SENATE REPORT].

[3] *See, e.g., In re* Grand Jury Investigation of Giancana, 352 F.2d 921, 923 (7th Cir. 1965), *cert. denied*, 382 U.S. 959 (1965); United States v. Coplon, 339 F.2d 192, 193 (6th Cir. 1964). *See also In re* Grand Jury Testimony of Kinoy, No. M-11-188, at 7-8 (S.D.N.Y., Jan. 29, 1971) (due process requires witness to be able to ascertain which questions are covered within the scope of an immunity grant; therefore, witness entitled to a prior ruling by the court on specific questions before he can be held in contempt).

[4] *See, e.g.*, Shillitani v. United States, 384 U.S. 364, 370-71 (1966). *In re* Parker, 411 F.2d 1067, 1068 (10th Cir. 1969), *vacated as moot*, 397 U.S. 96 (1970); United States v. Krueger, 301 F. Supp. 1123, 1126 (E.D.N.Y. 1969); *In re* Lazarus, 276 F. Supp. 434, 442 (C.D. Cal. 1967).

[5] Shillitani v. United States, 384 U.S. 364, 369-70 (1966). *In re* Grand Jury Investigation of Giancana, 352 F.2d at 925; *In re* Lazarus, 276 F. Supp. 434, 448 (C.D. Cal. 1967). *See* HOUSE REPORT 46; SENATE REPORT 148.

[6] *See* note 5 *supra*.

[7] *In re* Lazarus, 276 F. Supp. 434, 450 (C.D. Cal. 1967); Shillitani v. United States, 384 U.S. 364, 368 (1966); *In re* Parker, 411 F.2d 1067, 1068 (10th Cir. 1969). *See* HOUSE REPORT 46; SENATE REPORT 148.

[8] Shillitani v. United States, 384 U.S. at 368 (1966); *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902); United States v. Krueger, 301 F. Supp. 1123, 1126 (E.D.N.Y. 1969); *See* Brown v. United States, 359 U.S. 41, 55 (1959) (Warren, C.J., dissenting), *overruled in* Harris v. United States, 382 U.S. 162, 167 (1965).

[9] *See* note 4 *supra*.

confinement and its particular features, the remedy is considered civil in nature, and the witness is not entitled to the same procedural protections that are provided for the defendant accused of a criminal act. Thus, an indictment and jury trial are not within the due process requirements which must be afforded the recalcitrant witness.[10]

II. SPECIFIC PROVISIONS

The present codification applies to "any proceeding before or ancillary to any court or grand jury of the United States."[11] As in title II, a proceeding "ancillary to" a court would include a pre-trial deposition hearing.[12] As was noted in the discussion of title II, the immunity provision was designed to include within its scope "testimony *or other information*"[13] (emphasis added). Likewise, the contempt provision may be applied for the failure of the witness to provide, in addition to testimony, "other information" including books, records, or other material.[14]

Consistent with the court imposed restraints on civil contempt,[15] the statute prohibits confinement, with respect to court proceedings, in excess of the life of the proceeding.[16] With respect to grand jury proceedings, confinement is limited to the term of the grand jury, including extensions, but not in excess of eighteen months.[17]

The Senate version of the Act did not contain the eighteen month limitation.[18] Prior to the Organized Crime Control Act, a grand jury was authorized to sit for a maximum of only eighteen months.[19] Because a special grand jury created by the Act can sit for up to thirty-six months,[20] the Senate version was criticized for authorizing possible summary confinement for this extended peri-

[10] Shillitani v. United States, 384 U.S. at 371 (1966); Uphaus v. Wyman, 364 U.S. 388, 403-04 (1960) (Douglas, J., dissenting). However, when a witness is cited for criminal contempt, a jury trial must be available for the witness to be sentenced in excess of six months. Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966); Bloom v. Illinois, 391 U.S. 194, 208 (1968) (right to jury trial fundamental in criminal contempt cases; that is, if not petty crime). *See also* Frank v. United States, 395 U.S. 147 (1969). *But see* United States v. Bukowski, 435 F.2d 1094 (7th Cir. 1970) (citation for criminal contempt for three year sentence—neither jury trial nor indictment required), *cert. pending*, Bukowski v. United States, 39 U.S.L.W. 3339 (No. 968, petition for cert. filed Nov. 13, 1970).

[11] 28 U.S.C.A. § 1826(a) (Supp. 1971).

[12] HOUSE REPORT 46; SENATE REPORT 148.

[13] *See* TITLE II—GENERAL IMMUNITY, n. 10.

[14] 28 U.S.C.A. § 1826(a) (Supp. 1971); HOUSE REPORT 46; SENATE REPORT 148.

[15] *See* note 4 *supra*.

[16] 28 U.S.C.A. § 1826(a)(1) (Supp. 1971).

[17] *Id.* § 1826(a)(2).

[18] *See* proposed § 301(a), reprinted in SENATE REPORT 11.

[19] FED. R. CRIM. P. 6(g).

[20] 18 U.S.C.A. § 3331(a) (Supp. 1971). *See* TITLE I—SPECIAL GRAND JURY, n. 12 and accompanying text.

od of time[21] contrary to the existing practice.[22] The House subsequently imposed the eighteen month limitation.[23] There is no limitation, however, on confinement to the original term of the grand jury. Thus, a recalcitrant witness may be summarily jailed for either eighteen months or until the special grand jury proceedings (including any extensions) are terminated, whichever occurs first.[24] Since a witness prior to the passage of the Act could be held only until the end of the grand jury's maximum term of eighteen months, he would, under the Organized Crime Control Act of 1970, be *less* inclined to refuse compliance with an order to testify toward the end of the special grand jury's original term; he would still face the possibility of confinement for a total of eighteen months, as the special grand jury may have its term extended up to a maximum of thirty-six months.[25]

When the witness is before a court proceeding, the eighteen month limitation does not apply.[26] Since "court proceeding" is not specifically defined, some have expressed fear that the phrase could be interpreted to include all appeals subsequent to trial, and thus subject the witness to confinement for a period of time which

---

[21] *See, e.g., Hearings on S. 30, and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess., ser. 27, at 494 (1970) [hereinafter cited as *House Hearings*] (statement of Lawrence Speiser, then Director, Washington Office, American Civil Liberties Union); "If a person has refused to speak for a long time, there is little likelihood that he will change his mind. Further confinement becomes punitive not coercive, and should not be permitted without a complete trial for criminal contempt of court." 116 CONG. REC. H9670 (daily ed. Oct. 6, 1970) (statement of Lawrence Speiser). *See also* COMM. ON FEDERAL LEGISLATION, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE PROPOSED ORGANIZED CRIME CONTROL ACT OF 1969 (S. 30) (1970), reprinted in *House Hearings* 293, at 307 [hereinafter cited as ABCNY]. *See generally* McClellan, *The Organized Crime Control Act*, 46 NOTRE DAME LAW. 55, 89 (1970); HOUSE REPORT 46; United States v. Doe, 405 F.2d 436, 438 (2d. Cir. 1968); *cf.* Shillitani v. United States, 384 U.S. 364, 371 n.9 (1966).

[22] However, in Shillitani v. United States, 384 U.S. 364, 371 n.8, after holding that the witness could not be confined beyond the term of the grand jury, the Court remarked: "By the same token, the sentences of imprisonment may be continued or reimposed if the witnesses adhere to their refusal to testify before a successor grand jury." To the extent that this comment would be interpreted to allow coercive confinement in excess of eighteen months, the original Senate proposal does not seem to alter the present practice.

[23] HOUSE REPORT 46; 28 U.S.C.A. § 1826(a)(2) (Supp. 1971). It appears unclear from the history to what extent the House amendment was intended to negate the implication from Mr. Justice Clark's footnote, (*see* note 22 *supra*) that coercive confinement may be continued for extended periods by calling a recalcitrant witness before a successor grand jury and demanding a response to the identical questions that originally resulted in his confinement. It is possible to interpret the House amendment as reflecting a congressional judgment that civil confinement in excess of eighteen months becomes punitive instead of coercive, requiring a discontinuance of the civil remedy. If this is to be the rationale, then it should equally apply to successor grand juries, limiting the total period of coercive confinement to eighteen months. Upon such a subsequent refusal, a court may charge the witness with criminal contempt (*cf.* Shillitani v. United States, 384 U.S. at 371 n.9 (1966)).

[24] 28 U.S.C.A. § 1826(a)(2) (Supp. 1971); HOUSE REPORT 46.

[25] 18 U.S.C.A. § 3331(a) (Supp. 1971).

[26] 28 U.S.C.A. § 1826(a) (Supp. 1971).

could last many years.[27] However, discussion in the House Hearings indicate that this provision would only authorize confinement until a trial court lost jurisdiction when an appeal was taken. At that point the relevant proceeding would be completed, as the witness would no longer be able to purge himself of his contempt and come forth and testify.[28]

III. BAIL

The title also specifically provides for bail pending an appeal of a confinement order under this section.[29] A discretionary standard[30] is instituted to conform to the standard in Rule 46(a)(2) of the *Federal Rules of Criminal Procedure,*[31] and presumably the *Bail Reform Act.*[32] The statute provides that bail shall be denied "if it appears that the appeal is *frivolous or taken for delay*"[33] (emphasis added). The statute also calls for the disposition of these appeals "as soon as practicable, but not later than thirty days from the filing of such appeal."[34]

When the bill first passed the Senate, it contained a more restrictive standard for bail pending the appeal of a confinement order for civil contempt.[35] Bail was to be denied unless there was a "substantial possibility of reversal" on appeal.[36] This standard was believed to shift the burden of showing whether bail should be granted from the Government[37] to the contemner. Those in support of this standard viewed bail on appeal as defeating the

---

[27] *See* 116 CONG. REC. H9670 (daily ed. Oct. 6, 1970) (statement of Lawrence Speiser, Director, Washington Office, American Civil Liberties Union). *See also House Hearings* 630-31.

[28] *House Hearings* 630-31.

[29] 28 U.S.C.A. §1826(b) (Supp. 1971).

[30] HOUSE REPORT 33.

[31] *Id.* 46. Although the civil contempt proceeding is civil in nature, courts have applied the standard enunciated in Rule 46(a)(2) for determinations of bail on appeal. *See, e.g.,* United States v. Coplon, 339 F.2d 192, 193-94 (6th Cir. 1964). *See also* ABCNY, *supra* note 21, at 307-08. The codification now resolves any questions as to the use of this standard by applying it, in its own right, to this civil proceeding.

[32] 18 U.S.C. § 3148 (Supp. IV, 1969).

[33] 28 U.S.C.A. § 1826(b) (Supp. 1971). *Compare* FED. R. CRIM. P. 46(a)(2), which states in part: "Bail may be allowed pending appeal . . . unless it appears that the appeal is frivolous or taken for delay." *See also* 18 U.S.C. § 3148 (Supp. IV, 1969) (Bail Reform Act of 1966) which states in part: "if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained." *Cf.* Proposed Rule 46, FED. R. CRIM. P., in 48 F.R.D. 553, 634-39 (1970) (eliminating the present 46(a)(2), reaffirming reliance on the standard in 18 U.S.C. § 3148 (Supp. IV, 1969).

[34] 28 U.S.C.A. § 1826(b). (Supp. 1971).

[35] *See* ABCNY, *supra* note 21, at 308-09; SENATE REPORT 33, 149.

[36] *See* Proposed 28 U.S.C. § 1826(b), reprinted in SENATE REPORT 11. *See also* SENATE REPORT 149.

[37] *See, e.g.,* United States v. Piper, 227 F. Supp. 735, 741 (N.D. Tex. 1964) (under Rule 46, burden on Government to show bail pending appeal should be denied); *see also* Rhodes v. United States, 275 F.2d 78, 82 (4th Cir. 1960).

coercive purpose of civil confinement.[38] However, the House Committee rejected this standard and chose instead the more lenient guideline[39] used to determine whether to grant bail during criminal appeals.[40]

However, in moving to the standard employed in determining whether bail should be granted pending an appeal of a criminal conviction, Congress has failed to clarify its precise intent. The inherent difference between the civil contempt proceeding and a criminal appeal might well lead to courts interpreting this codification in two different manners. In the case of a criminal conviction, of course, a fixed sentence is imposed. After an affirmance, the full sentence must be served (assuming the defendant has been out on bail).[41] When civil confinement is imposed, however, the maximum internment has been limited by the life of the grand jury. In this situation, bail pending appeal would tend to reduce the confinement period. Therefore, in determining whether to grant bail, a district court could consider all appeals to be for "purposes of delay," regardless of whether they were nonfrivolous, and deny bail on that basis.[42] Other courts could apply the spirit of the criminal standard,[43] and grant bail more frequently than their counterparts who employed a literal interpretation. Considering the special nature of the civil contempt proceeding, a meaningful bail standard should probably be phrased solely in terms of frivolity.[44]

Yet, the requirement that appeals be disposed of as soon as practicable, and within a maximum of thirty days[45] may encourage courts to grant bail in civil contempt appeals more frequently. Such a provision minimizes any reduction in confinement a witness might gain from bail on appeal and to this extent would not tend to defeat the coercive purpose of confinement. Thus the determination of whether to grant bail pending appeal could be

---

[38] *See House Hearings* 633.

[39] For an analysis of the distinction between these standards, *see* ABCNY *supra* note 21, at 307-08; *House Hearings* 633.

[40] *See* note 31 *supra*, and accompanying text.

[41] *Cf.* North Carolina v. Pearce, 395 U.S. 711, 718-19 (1969).

[42] Note that the standard uses the disjunctive "or" ("if it appears that the appeal is frivolous *or* taken for delay" (emphasis added)).

[43] *See, e.g.*, Banks v. United States, 414 F.2d 1150, 1153 (D.C. Cir. 1969) (Bail Reform Act plainly favors release); United States v. Piper, 227 F. Supp. 735, 741 (N.D. Tex. 1964) (trend since 1956 amendment to Rule 46 toward liberalization of allowance of bail); *see also* United States v. Ursini, 276 F. Supp. 993, 997 (D. Conn. 1967).

[44] *See* United States v. Piper, 227 F. Supp. 735, 740 (N.D. Tex. 1964): "An appeal is said to be 'frivolous' where it presents no debatable question or no reasonable possibility of reversal, the word meaning of little weight or importance, not worth notice, slight [citation omitted]." *See also* United States v. Martone, 283 F. Supp. 77, 80 (D.P.R. 1968).

[45] 28 U.S.C.A. § 1826(b) (Supp. 1971).

based upon the same considerations that a court would base its determination of whether to grant bail during the pendency of a criminal appeal.

IV. UNLAWFUL FLIGHT TO AVOID PROSECUTION

This title also amends the Interstate Flight to Avoid Prosecution Act[46] to include witnesses who flee from state criminal investigative commissions to avoid giving testimony, and witnesses who are subject to contempt proceedings for failing to give such testimony.[47] Prior to the amendment, the statute made it a federal offense to flee a state's jurisdiction to avoid criminal process or the giving of testimony in a criminal proceeding.[48] It provided a jurisdictional basis for federal law enforcement officials to act[49] where state officials could not, except in accordance with the lengthy process of state extradition.[50] The amendment now extends this jurisdictional base to include those who move in interstate commerce with the intent "to avoid service of, or contempt proceedings for alleged disobedience of, lawful process requiring attendance and the giving of testimony or the production of documentary evidence before an agency of a state empowered by the law of such state to conduct investigations of alleged criminal activities."[51] The venue for such a violation would lie in the district in which the avoidance of the service of process or contempt occurred.[52]

---

[46] 18 U.S.C. § 1073 (1964).
[47] *See* HOUSE REPORT 33, 46; SENATE REPORT 149.
[48] 18 U.S.C. § 1073 (1964).
[49] HOUSE REPORT 46.
[50] *See House Hearings* 100 (statement of Senator McClellan).
[51] Organized Crime Control Act of 1970 § 302(a), 18 U.S.C.A. § 1073 (Supp. 1971).
[52] *Id.* § 302(b), 18 U.S.C.A. § 1073 (Supp. 1971). *See* HOUSE REPORT 46.