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Federal District Courts Have No Authority to Interrupt Preexisting State Sentence to Impose Confinement for Civil Contempt.

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Hepford: Federal District Courts Have No Authority to Interrupt Preexistin

seeking a writ has the heavy burden of showing that the propriety of its issuance is clear and indisputable.[65] Viewing the legislative intent and the ramifications of the possible res judicata consequences to Calvert's federal claim it is arguable that an abuse of discretion had taken place, thus the mandamus remedy should have been granted.

There can be no question that docket control is imperative if a court is to adjudicate in a swift and orderly fashion.[66] But when legislative intent is clear on the question of exclusive jurisdiction and a stay is ordered, a conflict of policy exists. Mandamus has been and can continue to be an aid to appellate jurisdiction as well as a source of relief to a stifled litigant. The small loss of docket control that a district court would suffer in these exceptional cases is subordinate to the justice and its orderly administration that would follow the careful exercise of the writ. When these factors are combined with frustration of legislative intent and the possible denial of a federal forum as in *Will*, the need for a mandamus remedy is even more pressing.

James P. Keenan

FEDERAL COURTS—Civil Contempt—Federal District Courts Have No Authority To Interrupt Preexisting State Sentence To Impose Confinement for Civil Contempt

In re Liberatore,
574 F.2d 78 (2d Cir. 1978).

While serving two consecutive one year sentences for violations of Connecticut law, Thomas A. Liberatore was called before a federal grand jury in the District of Connecticut to provide handwriting exemplars and major case fingerprints. Upon Liberatore's continued refusal to provide them, and in accordance with the federal Recalcitrant Witnesses statute[1] the

Supreme Court of the United States held that the writ of mandamus to vacate the stay was proper. *Id.* at 282.

65. Will v. Calvert Fire Ins. Co., ___U.S.___, ___, 98 S. Ct. 2552, 2557, 57 L. Ed. 2d 504, 511 (1978); United States v. Duell, 172 U.S. 576, 582 (1899).

66. *See* Will v. United States, 389 U.S. 90, 96 (1967) (docket control imperative for orderly administration of district court).

1. The Recalcitrant Witnesses statute provides in part:

(a) Whenever a witness . . . refuses without just cause shown to comply with an order of the court to testify or provide other information . . . the court, upon such refusal . . . may summarily order his confinement . . . until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

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federal district court ordered that Liberatore be confined for civil contempt and that his state sentence be suspended during the confinement. Liberatore appealed, challenging this order on the ground that the federal district court lacked the authority to interrupt the service of the state sentence he was already serving.[2] Held—*Affirmed in part, reversed in part.* A federal district court has no authority to interrupt a preexisting state sentence to confine a recalcitrant witness for civil contempt.[3]

Judicial power to interfere with a prisoner's sentence has long been limited.[4] At common law, a trial court's judgment was within the court's control during the term in which it was made;[5] provided the punishment was not augmented, a court could amend, modify, or vacate the judgment.[6] Once the defendant had begun to serve his sentence, however, a court was without power to set aside or modify it,[7] since the court's authority over the prisoner ended when the original sentence went into effect.[8] Two exceptions to this general rule permitted sentence interruption after the prisoner had begun to serve his term. One exception allowed a court to substitute a valid sentence for one that was void.[9] Under the second exception, a court

(2) the term of the grand jury . . . .
28 U.S.C. § 1826 (1970).

2. *In re* Liberatore, 574 F.2d 78, 80 (2d Cir. 1978). Liberatore challenged the order on two other points: that he was not afforded adequate notice of opportunity to defend against the charge of contempt, and that the government failed to demonstrate the relevance and necessity of the prints and handwriting exemplars sought by the grand jury. *Id.* at 80. Holding that Liberatore waived the first point by not preserving it in the district court and holding that the government had no burden to make a preliminary showing that the materials were necessary, the court refuted both of these contentions. *Id.* at 82.

3. *Id.* at 90.

4. *See* United States v. Benz, 282 U.S. 304, 307 (1931); White v. Pearlman, 42 F.2d 788, 789 (10th Cir. 1930).

5. Martin v. United States, 517 F.2d 906, 911 (8th Cir.) (dissenting opinion), *cert. denied,* 423 U.S. 856 (1975); *see* United States v. Benz, 282 U.S. 304, 306-07 (1931). Since the prisoner's sentence was "in the breast of the court," it could be "amended, modified, or vacated by that court." *Id.* at 306-07 (citing Goddard v. Ordway, 101 U.S. 745, 752 (1879)).

6. *See* Fletcher v. State, 128 S.W.2d 997, 999 (Ark. 1939); State v. Everett, 79 S.E. 274, 277 (N.C. 1913); *Ex parte* Cox, 29 Tex. Ct. App. 84, 87, 14 S.W. 396, 397 (1890). *But see In re* Jones, 53 N.W. 468, 469 (Neb. 1892) (court had no power to vacate original sentence to impose a new one).

7. *See, e.g.,* Brown v. Rice, 57 Me. 55, 58 (1869); Commonwealth v. Weymouth, 84 Mass. (2 Allen) 144, 147 (1861); State v. Cannon, 2 P. 191, 192 (Or. 1884). *See generally* Annot., 168 A.L.R. 706 (1947).

8. *Cf.* People v. Meservey, 42 N.W. 1133, 1134 (Mich. 1889) (authority over prisoner passed when first sentence went into effect); State v. Cannon, 2 P. 191, 192 (Or. 1884) (court had done all it had legal power to do).

9. *See In re* Bonner, 151 U.S. 242, 259-60 (1894). This exception usually involves cases in which a sentence has been imposed by a court having no jurisdiction. *See* Wilson v. Bell, 137 F.2d 716, 719-20 (6th Cir. 1943); Nelson v. Foley, 223 N.W. 323, 324 (S.D. 1929). It also applies when the sentence imposed is within the power of the trial court but is erroneous or irregular. *See* Simmons v. United States, 89 F.2d 591, 595 (5th Cir.) (sentence set aside when in excess of maximum fixed by statute), *cert. denied,* 302 U.S. 700 (1937); DeBenque v.

could interrupt a prisoner's sentence because of an intentional act the prisoner had committed, thereby postponing the termination date of the sentence.[10] This "fault of the prisoner" exception allowed a court to interrupt the running of a criminal sentence in cases involving escape,[11] violation of military confinement,[12] or revocation of parole.[13] Generally, however, the prisoner has a recognized right to serve his sentence without interruption.[14]

An early state case considered the authority of a jurisdiction to interrupt its own sentence to impose a charge of contempt.[15] In *Williams v. State*[16] the Arkansas Supreme Court held that the state court possessed no power to interrupt a prisoner's confinement under a state sentence to impose an intervening punishment for contempt.[17] More recently, in *Martin v. United States*[18] a federal district court's interruption of a federal criminal sentence to impose a civil contempt sentence was allowed.[19] *Martin* and other courts of appeals have held that a federal court has the authority to interrupt a

United States, 85 F.2d 202, 207 (D.C. Cir.) (sentence of indeterminate term held void because contrary to statute), *cert. denied,* 298 U.S. 681 (1936).

10. *Compare* McDonald v. Lee, 217 F.2d 619, 623 (5th Cir. 1954) (second sentence for violating military confinement conditions interrupts running of first sentence), *vacated as moot,* 349 U.S. 948 (1955) *with* White v. Pearlman, 42 F.2d 788, 789 (10th Cir. 1930) (prisoner *mistakenly* discharged from prison allowed credit for time spent at liberty).

11. *See* Theriault v. Peek, 406 F.2d 117, 117 (5th Cir. 1968) (per curiam), *cert. denied,* 394 U.S. 1021 (1969).

12. *See* McDonald v. Lee, 217 F.2d 619, 623 (5th Cir. 1954), *vacated as moot,* 349 U.S. 948 (1955).

13. *See* Anderson v. Corall, 263 U.S. 193, 196 (1923).

14. *See* Martin v. United States, 517 F.2d 906, 911 (8th Cir.) (dissenting opinion) (quoting White v. Pearlman, 42 F.2d 788, 789 (10th Cir. 1930)) (unless interrupted by escape or other fault of prisoner sentence is continuous), *cert. denied,* 423 U.S. 856 (1975); *cf.* State v. Buck, 25 S.W. 573, 578 (Mo. 1894) (prisoner cannot be tried for another felony until he has served first sentence unless judgment set aside or reversed).

15. United States v. Liddy, 510 F.2d 669, 679 (D.C. Cir. 1974) (dissenting opinion), *cert. denied,* 420 U.S. 980 (1975); *see* Williams v. State, 188 S.W. 826, 827 (Ark. 1916).

16. 188 S.W. 826 (Ark. 1916).

17. *Id.* at 827. There are two types of contempt, civil and criminal. The nature and purpose of the punishment determines the character of a contempt order. *See* Southern Ry. Co. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968). "Civil contempt is 'wholly remedial' . . . and is intended to coerce compliance with an order of the court . . . . Criminal contempt . . . is punitive, . . . serves to vindicate the authority of the court, and cannot be ended by any act of the contemnor." *Id.* at 124-25. Criminal contempt is a fixed sentence served after the contemnor-prisoner has served his original sentence. Since the contemnor must serve a criminal contempt sentence regardless whether he subsequently purges his contempt, criminal contempt has no inherent coercive element as does civil contempt. *See* United States v. Liddy, 510 F.2d 669, 675-76 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 980 (1975). *See generally* Pabst Brewing Co. v. Brewery Workers Local 77, 555 F.2d 146, 149 (7th Cir. 1977) (distinguishing feature between civil and criminal contempt is order's purpose); Skinner v. White, 505 F.2d 685, 688-89 (5th Cir. 1974) (lists "essential distinctions" between civil and criminal contempt); Annot. 61 A.L.R. 2d 1083 (1958); Annot. 14 A.L.R. 2d 580 (1950).

18. 517 F.2d 906 (8th Cir.), *cert. denied,* 423 U.S. 856 (1975).

19. *Id.* at 907.

federal criminal sentence to impose confinement for civil contempt.[20] It has been argued that 18 U.S.C. § 3568[21] required a criminal sentence to be continuously served, thus allowing no interruption under the Recalcitrant Witnesses statute.[22] This argument has been refuted in two ways. Some courts harmonized the two statutes noting that since the interruption of a criminal sentence was based on civil contempt, there was no violation of section 3568 which requires that credit be given for any confinement connected with the original offense.[23] Other courts reasoned that section 3568 was never intended to apply to a fault of the prisoner situation wherein a contemnor-prisoner interrupts his own sentence by his intentional refusal to testify.[24] Strong dissents in these cases went beyond the question of statutory authority, to question the constitutionality of "sandwiching" a sentence for civil contempt within a preexisting sentence.[25] These dissenting opinions stress that the fifth amendment to the Constitution proscribes trying an individual twice for the same offense[26]

20. *See In re* Garmon, 572 F.2d 1373, 1375 (9th Cir. 1978); *In re* Grand Jury Investigation (Appeal of Hartzell), 542 F.2d 166, 169 (3d Cir. 1976), *cert. denied,* 429 U.S. 1047 (1977); United States v. Marshall, 532 F.2d 410, 411 (5th Cir.) (per curiam), *cert. denied,* 429 U.S. 924 (1976); Martin v. United States, 517 F.2d 906, 909 (8th Cir.), *cert. denied,* 423 U.S. 856 (1975); Williamson v. Saxbe, 513 F.2d 1309, 1310 (6th Cir. 1975) (per curiam); United States v. Liddy, 510 F.2d 669, 676-77 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 980 (1975); Anglin v. Johnston, 504 F.2d 1165, 1169 (7th Cir. 1974), *cert. denied,* 420 U.S. 962 (1975).

21. 18 U.S.C. § 3568 (1970) provides in part:

> The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.
>
> . . . .
>
> No sentence shall prescribe any other method of computing the term.

22. *In re* Garmon, 572 F.2d 1373, 1375 (9th Cir. 1978).

23. *Id.* at 1375; *see* Martin v. United States, 517 F.2d 906, 909-10 (8th Cir.), *cert. denied,* 423 U.S. 856 (1975).

24. *In re* Garmon, 572 F.2d 1373, 1375 (9th Cir. 1978); *see* United States v. Liddy, 510 F.2d 669, 673-75 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 980 (1975).

25. *See In re* Grand Jury Investigation (Appeal of Hartzell), 542 F.2d 166, 173 (3d Cir. 1976) (dissenting opinion) (majority interpretation of Recalcitrant Witnesses statute presents serious double jeopardy considerations), *cert. denied,* 429 U.S. 1047 (1977); Martin v. United States, 517 F.2d 906, 915 (8th Cir.) (dissenting opinion)(court's compelling of prisoner's testimony is harassment which violates double jeopardy clause), *cert. denied,* 423 U.S. 856 (1975); United States v. Liddy, 510 F.2d 669, 682 (D.C. Cir. 1974) (dissenting opinion) (extending expiration date of original sentence increases punishment, violating double jeopardy clause), *cert. denied,* 420 U.S. 980 (1975).

26. *Accord,* United States v. Ball, 163 U.S. 662, 669 (1896); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 170 (1873); *see* U.S. CONST. amend. V. "The prohibition is not against being twice punished, but against being twice put in jeopardy . . . ." United States v. Ball, 163 U.S. 662, 669 (1896). *See In re* Grand Jury Investigation (Appeal of Hartzell), 542 F.2d 166, 173 (3d Cir. 1976) (dissenting opinion), *cert. denied,* 429 U.S. 1047 (1977); Martin v. United States, 517 F.2d 906, 915 (8th Cir.) (dissenting opinion), *cert. denied,* 423 U.S. 856 (1975);

and disallows the imposition of two penalties for the same offense.[27] The Supreme Court has held that resentencing that augments a sentence previously imposed and partly served violates the double jeopardy clause.[28] Since the interruption of the prisoner's sentence delays his release date, it prolongs his sentence and increases the penalty he must suffer.[29] The policy of sentence interruption, the dissenting judges argue, is therefore in contravention of the fifth amendment double jeopardy clause.[30]

The courts of appeals upholding sentence interruption for civil contempt have been consistent in refusing to allow prisoners jail credit for their original sentences for time spent in prison for contempt.[31] The rationale has been that a prisoner's incentive to testify would be removed if he would suffer no detriment for his refusal.[32] The courts have been reluctant to restrict coercive power over a recalcitrant witness merely because he is already imprisoned.[33]

In *In re Liberatore*[34] the Court of Appeals for the Second Circuit dealt with the authority of a federal court to interrupt a preexisting state sentence, an issue never previously considered by any court.[35] The court recog-

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United States v. Liddy, 510 F.2d 669, 682 (D.C. Cir. 1974) (dissenting opinion), *cert. denied*, 420 U.S. 980 (1975). *See generally* Green v. United States, 355 U.S. 184, 189 (1957).

27. *See Ex parte* Lange, 85 U.S. (18 Wall.) 163, 170 (1873); *In re* Grand Jury Investigation (Appeal of Hartzell), 542 F.2d 166, 173 (3d Cir. 1976) (dissenting opinion), *cert. denied*, 429 U.S. 1047 (1977); Martin v. United States, 517 F.2d 906, 915 (8th Cir.) (dissenting opinion), *cert. denied*, 423 U.S. 856 (1975); United States v. Liddy, 510 F.2d 669, 682 (D.C. Cir. 1974) (dissenting opinion), *cert. denied*, 420 U.S. 980 (1975).

28. *See* United States v. Benz, 282 U.S. 304, 307 (1931).

29. *See* United States v. Liddy, 510 F.2d 669, 682 (D.C. Cir. 1974) (dissenting opinion), *cert. denied*, 420 U.S. 980 (1975). By extending the expiration date of the prisoner's original sentence, punishment not part of the trial court's first sentence has been imposed on the prisoner. Since "time is the stuff that life is made of," the additional months of anxiety, anguish, and delay is increased punishment. *Id.* at 683 (dissenting opinion).

30. *See In re* Grand Jury Investigation (Appeal of Hartzell), 542 F.2d 166, 173 (3d Cir. 1976) (dissenting opinion), *cert. denied*, 429 U.S. 1047 (1977); Martin v. United States, 517 F.2d 906, 915 (8th Cir.) (dissenting opinion), *cert. denied*, 423 U.S. 856 (1975); United States v. Liddy, 510 F.2d 669, 682-84 (D.C. Cir. 1974) (dissenting opinion), *cert. denied*, 420 U.S. 980 (1975). The Supreme Court, however, has consistently refused to decide this question by denying certiorari in each of these cases.

31. *See, e.g., In re* Garmon, 572 F.2d 1373, 1375 (9th Cir. 1978); *In re* Grand Jury Investigation (Appeal of Hartzell), 542 F.2d 166, 169 (3d Cir. 1976), *cert. denied*, 429 U.S. 1047 (1977); United States v. Marshall, 532 F.2d 410, 411 (5th Cir.) (per curiam), *cert. denied*, 429 U.S. 924 (1976).

32. *See* Anglin v. Johnston, 504 F.2d 1165, 1167 (7th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); Williamson v. Saxbe, 513 F.2d 1309, 1310-11 (6th Cir. 1975).

33. *See, e.g.*, Shillitani v. United States, 384 U.S. 364, 370 (1966); Williamson v. Saxbe, 513 F.2d 1309, 1310-11 (6th Cir. 1975); Anglin v. Johnston, 504 F.2d 1165, 1167 (7th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). *But see* Martin v. United States, 517 F.2d 906, 913 (8th Cir.) (dissenting opinion) (states policy reasons for protecting prisoners from sentence interruption), *cert. denied*, 423 U.S. 856 (1975).

34. 574 F.2d 78 (2d Cir. 1978).

35. *Id.* at 84. Judge Waterman noted that *In re Liberatore* dealt with "an issue not previously considered by us or by any other court." *Id.* at 84.

nized the well-established principle that a federal court can act only upon constitutional, statutory, or implied authority.[36] The court found that the only conceivable statutory basis supporting the order was the Recalcitrant Witnesses statute.[37] In determining that it did not provide the necessary authority, the court set out three reasons for a strict construction of the statute. First, it had been suggested that the practice of interrupting a preexisting criminal sentence may have constitutional infirmities.[38] Since courts disfavor statutory interpretations which raise constitutional questions, the Second Circuit was hesitant to give the statute broad construction.[39] The second reason involved a recognition of the general historic limitations on the power of a court to alter even its own criminal sentence by interruption or modification.[40] Third, tampering with the decision of another sovereignty is in derogation of common law conceptions of comity.[41] The court also noted that there was no express intention on the part of Congress that the statute should apply to already imprisoned contemnors.[42] Additionally, the court found no inherent authority to interrupt Liberatore's state sentence.[43] This lack of inherent authority was based on the principles of comity which preclude interference with the proceedings of another sovereignty.[44]

The *Liberatore* court recognized those prior cases in other circuits which had held that a federal civil contempt sentence could be interposed within a federal criminal sentence. Agreeing with the dissenting opinions in those cases, the *Liberatore* court found that the "fault of the prisoner" theory did not apply to contemnors who were already imprisoned.[45] The court reasoned that the fault of the prisoner theory was inapplicable because unlike an escapee or parole violator, a prisoner who refuses to testify does not intend to avoid his sentence.[46] If the prisoner has no intention to interrupt his sentence, the fault of the prisoner theory cannot apply.[47] The court

36. *Id.* at 84.

37. *Id.* at 84; *see* 28 U.S.C. § 1826 (1970).

38. *In re* Liberatore, 574 F.2d 78, 85 (2d Cir. 1978).

39. *Id.* at 85; *see* International Ass'n of Machinists v. Street, 367 U.S. 740, 749 (1961); United States v. Oates, 560 F.2d 45, 80 (2d Cir. 1977).

40. *In re* Liberatore, 574 F.2d 78, 85 (2d Cir. 1978). To the extent that section 1826 was alleged to have revised these limitations on the judicial power to interrupt preexisting sentences, the court strictly interpreted the statute because it operated in derogation of the common law. *Id.* at 85.

41. *Id.* at 85.

42. *Id.* at 86.

43. *Id.* at 88.

44. *Id.* at 88.

45. *Id.* at 87. The fault of the prisoner theory has been applied to a contemnor who refuses to testify. *See* Giancana v. United States, 352 F.2d 921, 923 (7th Cir.) (contemnor told he had key to his own cell), *cert. denied*, 382 U.S. 959 (1965).

46. *In re* Liberatore, 574 F.2d 78, 87 n.8 (2d Cir. 1978); *see* Martin v. United States, 517 F.2d 906, 911-12 (8th Cir.) (dissenting opinion), *cert. denied*, 423 U.S. 856 (1975).

47. *In re* Liberatore, 574 F.2d 78, 87 n.8 (2d Cir. 1978).

Hepford: Federal District Courts Have No Authority to Interrupt Preexistin

also discussed a basic distinction between *Liberatore* and the decisions of other courts of appeals.[48] Unlike the cases decided by other appellate courts in which a federal court interrupted a federal sentence, *Liberatore* dealt with the federal interruption of a state imposed sentence.[49] Citing the leading case of *Covell v. Heyman*,[50] the Second Circuit emphasized the rule that allows the sovereign which first arrests an individual to acquire the right to prior and exclusive jurisdiction over him.[51]

Although the court explicitly avoided expressing an opinion regarding the possible constitutional infirmities of sentence interruption,[52] the court pointed out that such an argument had been made.[53] Proponents of that argument contend that the interruption of an intervening confinement constitutes double jeopardy to the imprisoned contemnor because its effect is to extend the expiration date of the original sentence.[54] It is doubtful that this double jeopardy argument is sound. The first sentence is not being replaced by one more severe, nor does the interruption interfere with the judgment of the first court.[55] The sentence is merely tolled until the contemnor-prisoner consents to testify.[56]

A primary basis of the *Liberatore* court's opinion was that the Recalcitrant Witnesses statute could not be interpreted to allow sentence interruption. While *Liberatore* held that a federal district court had no statutory authority to interrupt a preexisting state sentence,[57] it is evident from dicta in the case that the court felt the interruption of a federal sentence is likewise impermissible, and perhaps unconstitutional.[58] Although the

48. *See id.* at 87.

49. *Compare id.* at 87 (federal court interrupting state imposed sentence) *with* Martin v. United States, 517 F.2d 906, 908 (8th Cir.) (federal court interrupting federal sentence), *cert. denied*, 423 U.S. 856 (1975).

50. 111 U.S. 176 (1884). The Supreme Court stated that the forbearance which state and federal courts exercise over each other is something more than comity, something of right and law. Although the courts co-exist in the same space, they are independent and do not have a common superior. *Id.* at 182.

51. *See In re* Liberatore, 574 F.2d 78, 88-89 (2d Cir. 1978).

52. *See id.* at 85.

53. *Id.* at 85; *see, e.g.*, *In re* Grand Jury Investigation (Appeal of Hartzell), 542 F.2d 166, 173 (3d Cir. 1976) (dissenting opinion), *cert. denied*, 429 U.S. 1047 (1977); United States v. Liddy, 510 F.2d 669, 682-83 (D.C. Cir. 1974) (dissenting opinion), *cert. denied*, 420 U.S. 980 (1975).

54. *See* Martin v. United States, 517 F.2d 906, 915 (8th Cir.) (dissenting opinion), *cert. denied*, 423 U.S. 856 (1975); United States v. Liddy, 510 F.2d 669, 682 (D.C. Cir. 1974) (dissenting opinion), *cert. denied*, 420 U.S. 980 (1975).

55. *See In re* Garmon, 572 F.2d 1373, 1375 (9th Cir. 1978) (civil contempt confinement acts to interrupt a sentence, not modify it); Martin v. United States, 517 F.2d 906, 910 (8th Cir.) (civil contempt proceeding is entirely separate court proceeding from criminal case), *cert. denied*, 423 U.S. 856 (1975).

56. *See In re* Garmon, 572 F.2d 1373, 1375 (9th Cir. 1978); Martin v. United States, 517 F.2d 906, 909 (8th Cir.), *cert. denied*, 423 U.S. 856 (1975).

57. *In re* Liberatore, 574 F.2d 78, 90 (2d Cir. 1978).

58. *Id.* at 85; *see In re* Grand Jury Investigation (Appeal of Hartzell), 542 F.2d 166, 173

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other courts of appeals which have addressed this question have applied the Recalcitrant Witnesses statute to justify interruption of federal criminal sentences,[59] the Second Circuit interpreted the statute's language and legislative history to preclude such interruption.[60] Such a restrictive view of the statute may not be warranted. No question exists regarding the authority of a trial court to imprison a contemnor;[61] the differing views concern when this imprisonment should take place.[62] To determine when the imprisonment should occur, it must first be decided whether the purpose of the Recalcitrant Witnesses statute is to punish or coerce the contemnor.[63] If the intent is to punish, as in criminal contempt, then clearly there is no need to interrupt a preexisting sentence since the additional contempt confinement can follow the first sentence.[64] A consecutive sentence is appropriate to criminal contempt since there is no need for immediate service of the sentence as there is in the case of civil contempt.[65] On the other hand, since the purpose of civil contempt is to coerce the witness to testify, it is equally clear that the imprisonment will only have its desired effect during the judicial proceedings in which the testimony is sought.[66] The Recalcitrant Witnesses statute was intended to empower a federal court to confine a witness who, without just cause, refuses to provide evidence to a grand jury.[67] Even if the imposition of a "stacked" rather than a "sandwiched" punishment could be viewed as coercive, the Recalcitrant Witnesses statute does not provide for this sort

(3d Cir. 1976) (dissenting opinion), *cert. denied*, 429 U.S. 1047 (1977); United States v. Liddy, 510 F.2d 669, 682-83 (D.C. Cir. 1974) (dissenting opinion), *cert. denied*, 420 U.S. 980 (1975).

59. *See, e.g., In re* Garmon, 572 F.2d 1373, 1375 (9th Cir. 1978); *In re* Grand Jury Investigation (Appeal of Hartzell), 542 F.2d 166, 169 (3d Cir. 1976), *cert. denied*, 429 U.S. 1047 (1977); United States v. Thurmond, 534 F.2d 41, 43 (5th Cir. 1976).

60. *See In re* Liberatore, 574 F.2d 78, 86-87 (2d Cir. 1978).

61. *See, e.g.*, Kastigar v. United States, 406 U.S. 441, 443-44 (1972); Shillitani v. United States, 384 U.S. 364, 369-70 (1966); United States v. United Mine Workers, 330 U.S. 258, 302-03 (1947) (Black & Douglas, JJ., concurring in part and dissenting in part).

62. *See* United States v. Liddy, 510 F.2d 669, 675-76 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 980 (1975).

63. *See* Shillitani v. United States, 384 U.S. 364, 370 (1966). Confinement for contempt is coercive in nature and designed to compel obedience with the court's order. *Id.* at 368.

64. *See* Pabst Brewing Co. v. Brewery Workers Local 77, 555 F.2d 146, 150 (7th Cir. 1977); Southern Ry. Co. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968).

65. *See* United States v. Liddy, 510 F.2d 669, 675-76 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 980 (1975).

66. *See* United States v. Marshall, 532 F.2d 410, 411 (5th Cir.) (per curiam), *cert. denied*, 429 U.S. 924 (1976).

67. It can be seen from the legislative history that the congressional intent was to coerce the witness, not punish him. *See* United States v. Marshall, 532 F.2d 410, 411 (5th Cir.) (per curiam), *cert. denied*, 429 U.S. 924 (1976); H.R. REP. No. 1549, 91st Cong., 2d Sess. 46, (purpose is to secure witness' testimony through a sanction, not punish witness by imprisonment), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007, 4022; H.R. REP. No. 1549, 91st Cong., 2d Sess. 33 (intent to codify present civil contempt practice), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007, 4008.

of imprisonment.[68] The statute only allows imprisonment while the judicial proceedings are in session.[69]

It is unlikely that Congress intended to exclude already imprisoned witnesses from the coercive sanctions of the Recalcitrant Witnesses statute[70] when all other types of witnesses are subject to them.[71] Although the statute does not appear to have contemplated an already incarcerated contemnor,[72] it was clearly the intent of Congress to allow the judicial coercion of a witness through the threat of possible imprisonment.[73] Since imprisonment will not coerce an already imprisoned contemnor, another method of coercion must be used. The statute, therefore, can reasonably be interpreted to sanction interruption of a federal sentence by a federal court to coerce a witness.[74] Moreover, the Second Circuit's interpretation of congressional intent differs from that adopted by the other courts of appeals.[75]

The second major basis of the court's decision in *Liberatore* was that the federal court had no inherent authority to interrupt a state imposed sentence since the second sentence was imposed by a different sovereignty.[76] Although the court stated that its decision was based on prinicples of comity,[77] the decision was actually made on a more fundamental princi-

68. *See* 28 U.S.C. § 1826 (1970).

69. *Id.*

70. *See* Martin v. United States, 517 F.2d 906, 908-09 (8th Cir.), *cert. denied,* 423 U.S. 856 (1975). "No sound policy reason exists to support a conclusion that prisoners can escape the application of § 1826(a) when a person charged but not convicted of an offense, or one convicted but not yet sentenced would be subject to its application." *Id.* at 908-09; *cf.* Kastigar v. United States, 406 U.S. 441, 446-47 (1972) (government has legitimate demands to require testimony of citizens).

71. *See* Martin v. United States, 517 F.2d 906, 908-09 (8th Cir.), *cert. denied,* 423 U.S. 856 (1975).

72. *See In re* Liberatore, 574 F.2d 78, 86 (2d Cir. 1978).

73. *See* 28 U.S.C. § 1826 (1970); H.R. REP. No. 1549, 91st Cong., 2d Sess. 46, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007, 4022. The statute's "purpose is to secure the testimony through a sanction, not to punish the witness by imprisonment." *Id.* at 4022.

74. *See, e.g., In re* Grand Jury Investigation (Appeal of Hartzell), 542 F.2d 166, 168-69 (3d Cir. 1976) (coercive effect of section 1826 would be meaningless if credit given), *cert. denied,* 429 U.S. 1047 (1977); United States v. Thurmond, 534 F.2d 41, 42 (5th Cir. 1976) (to allow credit would wholly frustrate the clearly articulated congressional goal); Anglin v. Johnston, 504 F.2d 1165, 1169 (7th Cir. 1974) (allowing credit would remove incentive to compel testimony sought), *cert. denied,* 420 U.S. 962 (1975).

75. *Compare In re* Libertore, 574 F.2d 78, 85 (2d Cir. 1978) (dicta) (section 1826 cannot provide basis for sentence interruption) *with In re* Grand Jury Investigation (Appeal of Hartzell), 542 F.2d 166, 169 (3d Cir. 1976) (weight of authority allows sentence interruption under section 1826), *cert. denied,* 429 U.S. 1047 (1977).

76. *See In re* Liberatore, 574 F.2d 78, 87-88 (2d Cir. 1978); *cf.* M'Kim v. Voorhies, 11 U.S. (7 Cranch) 279, 281 (1812) (state court has no jurisdiction to enjoin judgment of circuit court of the United States); Diggs v. Wolcott, 8 U.S. (4 Cranch) 179, 180 (1807) (circuit court of the United States cannot enjoin state court proceedings).

77. *See In re* Liberatore, 574 F.2d 78, 88 (2d Cir. 1978). Comity is the forbearance that courts of coordinate jurisdiction exercise toward each other to avoid conflicts by avoiding interference with the process of each other. Covell v. Heyman, 111 U.S. 176, 182 (1884).

ple—preservation of original jurisdiction.[78] This principle prevents conflict of jurisdiction between federal and state courts.[79] It allows the court that first takes control of the subject matter of the litigation to exhaust its proceedings before the other court may attempt to adjudicate it.[80] The state courts have a right to be free from federal interference with their sentences.[81] It was the state court which obtained prior and exclusive control over Liberatore; therefore, in accordance with the rule, the federal court had no authority to interrupt the state imposed sentence.[82] Nevertheless, comity principles need not foreclose the possibility that sovereignties may cooperate in their prosecution of crime. Comity does not require that one sovereignty stand idly by while the first sovereignty deals with a prisoner.[83] The first sovereignty can "lend" the second sovereignty its prisoner so that he can be tried or can testify in the second's courts while remaining under the first's control.[84] The question then arises whether such a "loan" permits the second court to interfere with a judgment or sentence of the first sovereignty.[85]

The purpose of the lending doctrine is to allow the second sovereignty to insure a fair trial within its jurisdiction by securing a prisoner's testimony.[86] A prisoner may, with the consent of the first sovereignty, testify in the second sovereignty's court without an infringement of the comity doctrine.[87] According to *Liberatore,* when a prisoner who is brought before

78. *See* Ponzi v. Fessenden, 258 U.S. 254, 260 (1922); Covell v. Heyman, 111 U.S. 176, 182 (1884); Baldwin v. Lewis, 442 F.2d 29, 31-32 (7th Cir. 1971).

79. Covell v. Heyman, 111 U.S. 172, 182 (1884).

80. *See* Ponzi v. Fessenden, 258 U.S. 254, 260 (1922); Covell v. Heyman, 111 U.S. 176, 182 (1884); Lundsford v. Hudspeth, 126 F.2d 653, 655 (10th Cir. 1942).

81. *See* Riggs v. Johnson County, 73 U.S. (6 Wall.) 166, 195-96 (1867). Federal courts of appeals and state courts act separately and independently of each other. Appellate relations exist between the state courts and the Supreme Court, but not between the state courts and the courts of appeals. *Id.* at 195-96.

82. *See In re* Liberatore, 574 F.2d 78, 90 (2d Cir. 1978); United States v. Andy, 549 F.2d 1281, 1283 (9th Cir. 1977) (dissenting opinion); Lundsford v. Hudspeth, 126 F.2d 653, 655 (10th Cir. 1942).

83. *See In re* Liberatore, 574 F.2d 78, 89 (2d Cir. 1978); Lundsford v. Hudspeth, 126 F.2d 653, 655-56 (10th Cir. 1942).

84. *See* Ponzi v. Fessenden, 258 U.S. 254, 261-66 (1922); Zerbst v. McPike, 97 F.2d 253, 254 (5th Cir. 1938). There is a uniform act, the Interstate Agreement on Detainers Act, which provides for an exchange of prisoners between states to allow that person to be tried in the court of another sovereignty. To date this act has been adopted by forty-five states and the federal government. *E.g.,* 18 U.S.C. app., at 4475 (1970); CONN. GEN. STAT. ANN. §54-186 (West 1960); TEX. CODE CRIM. PRO. ANN. art. 51.14 (Vernon 1979).

85. *See In re* Liberatore, 574 F.2d 78, 89 (2d Cir. 1978). *See also* Ponzi v. Fessenden, 258 U.S. 254, 261-62 (1922); Zerbst v. McPike, 97 F.2d 253, 254 (5th Cir. 1938).

86. *See generally* S. REP. No. 1356, 91st Cong., 2d Sess. 1, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4864, 4865.

87. *Cf.* McDonald v. United States, 403 F.2d 37, 38 (5th Cir. 1968) (surrender of state prisoner to federal government is question of comity); Opheim v. Willingham, 364 F.2d 989, 990 (10th Cir. 1966) (jurisdiction and custody are questions of comity).