

The header features a dark blue background with a central hexagonal logo containing the letters 'R+C'. Surrounding the logo are various white icons representing technology, law, and global communication, such as a globe, a magnifying glass, a cloud with an up arrow, a gear, a padlock, a mail envelope, a person icon, a wrench, a laptop, and a clock. A hand is shown pointing towards the central logo.

## A Robinson+Cole Legal Update

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### The Walsh Act: Discovery from U.S. Citizens Living Abroad

Authored by [Benjamin M. Daniels](#) and [Joshua L. Coker](#)

*This is the second in a series of Legal Updates about international discovery and cross-border litigation. Robinson+Cole has broad experience representing international clients and their U.S. subsidiaries in both domestic and international disputes. If you have any questions about this article or cross-border litigation, please contact the attorneys listed below.*

Cross-border litigants are familiar with the Hague Evidence Convention, but often overlook another potent method to collect evidence in foreign countries. The Walsh Act, 28 U.S.C. § 1783, gives courts the discretion to subpoena a U.S. national who is in a foreign country. The Act gives courts the power to order the production of testimony or documents, or even compel the U.S. national to return to the United States. To trigger these powers, an applicant for the Walsh Act subpoena must show that production of the evidence is “necessary to the interests of justice” and “cannot be obtained by other means.” This powerful tool streamlines what is otherwise a lengthy discovery process under the Hague Evidence Convention.

#### **What Is the Walsh Act?**

The Walsh Act was enacted nearly 100 years ago to ensure access to evidence from the perpetrators of the Teapot Dome scandal, who were fleeing the country. Congress recognized that the United States, like all sovereigns, has the inherent power to recall its citizens in the public interest, and to punish citizens who refuse to return. See *Blackmer v. United States*, 284 U.S. 421, 438 (1932). It therefore enacted the Walsh Act (Act), giving U.S. courts the power to force a U.S. person (even a third party) to return to the country to provide testimony and documents. The Act is broad and flexible, and courts have applied it in criminal cases and civil cases alike. Although the Act does not apply to arbitrations seated abroad, no court has addressed whether it could apply to an arbitration seated in the United States.

#### **When Do Courts Issue Walsh Act Subpoenas?**

The Act has low hurdles to discovery in civil cases.[1] A party applying for a Walsh Act subpoena in a civil case needs to show the evidence sought (1) “is necessary in the interest of justice”; and (2) “cannot be obtained by other means.” 28 U.S.C. § 1783(a). While these might sound like high hurdles, they generally are not.

For the first element, courts disagree on what is “necessary to the interests of justice.” Some courts say an applicant must show that “a ‘compelling reason’ exists” to order production of evidence.[2] Other courts describe the element requiring only proof that the evidence would be “relevant” under Federal Rule of Civil Procedure 26.[3] Under either standard, courts find that evidence is “necessary to the interests of justice” if it goes to a core issue in the litigation.

For the second element, courts recognize that the phrase “cannot be obtained by other means” does not require impossibility, but merely impracticability.[4] This means that an applicant needs to show that it would be impractical to obtain the evidence from another source. For example, this might entail proof that the target of the subpoena is the only party with access to a full set of documents. Or it may be enough to show that a third party’s testimony would test the veracity of testimony from a party. There are many ways of showing this, and the arguments mirror run-of-the-mill discovery disputes in regular domestic cases.

### **What Happens After the Court Issues a Walsh Act Subpoena?**

If the court issues a subpoena, there are four options for service: (1) by any method of service recognized by international law, such as the Hague Convention; (2) by any method of service used by the foreign country in which the absentee citizen or resident is currently located; (3) unless prohibited by the foreign country’s laws, through personal service or certified mail; or (4) any method ordered by the court that does not violate the laws of the foreign country. Fed. R. Civ. P. 4(a). Practically speaking, most Walsh Act subpoenas are issued to individuals in countries that have signed the Hague Service Convention. As a result, service is usually done under that Convention, which requires service on the country’s Central Authority. Once received, that Central Authority serves the subpoena through the country’s approved methods.

### **Why Use the Walsh Act?**

There are many advantages to a Walsh Act subpoena. Getting evidence through the Hague Evidence Convention is a long and onerous process that often yields scant evidence. In the best-case scenario, a litigant first applies to a U.S. court for a letter of request, and then briefs and argues the application. If the application is granted, the litigant must arrange for transmission of the application to the Central Authority of the foreign country at issue, hire foreign counsel, address any concern raised by the Central Authority, wait for the Central Authority to serve the subpoena, address any objections raised by the witness, and finally, arrange for the collection of evidence under the foreign country’s rules. This last step often comes with severe restrictions on the gathering of evidence. For example, Switzerland has made it illegal for a foreign lawyer to conduct any type of deposition. Instead, the Swiss Central Authority designates a judge to ask questions, and then transmits a rough summary of the testimony. This can take years to play out.

The Walsh Act, by contrast, offers full U.S.-style discovery with no foreign privacy restrictions. Once the Central Authority serves the subpoena, all the litigation occurs in U.S. courts under U.S. rules. The recipient can object in U.S. court or must return to the U.S. and provide the documents and any testimony requested. All this discovery is litigated under the Federal Rules of Civil Procedure. If the recipient refuses to participate, the U.S. court has the inherent power to punish the citizen through contempt sanctions including, but not limited to, monetary sanctions.

### **Conclusion**

In conclusion, a Walsh Act subpoena provides a method of compelling testimony or production of evidence from a non-party American citizen or resident who is abroad and thus cannot be compelled through more conventional methods. Because of the flexibility of this statute and its ability to reach American citizens no matter where they are in the world, it is a powerful tool for litigants that should not be overlooked by those embroiled in cross-border litigation.

## FOR MORE INFORMATION

For more information, contact any of the Robinson+Cole team members listed below:



[Benjamin M. Daniels](#)



[Joshua L. Coker](#)



[Edward J. Heath](#)



[Jeffrey J. White](#)



[Jenna M. Scoville](#)

## ENDNOTES

[1] The standard is lower in criminal cases because the applicant need only show that the particular testimony or document is necessary in the interests of justice. See, e.g., *United States v Zim Israel Navigation Co.*, 239 F. Supp. 446 (S.D.N.Y. 1965)

[2] *Est. of Ungar*, 412 F. Supp. 2d 328, 334 (S.D.N.Y. 2006)

[3] See *Balk v. New York Inst. of Tech.*, 974 F. Supp. 2d 147 (E.D.N.Y. 2013).

[4] *Id.*

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