Congressional Research Service
Informing the legislative debate since 1914

Venue: A Legal Analysis of Where a Federal Crime May Be Tried

Updated December 6, 2018

Congressional Research Service
https://crsreports.congress.gov
RL33223

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The United States Constitution assures those charged with a serious federal crime that they will be prosecuted in the state and district in which the crime occurred. A crime occurs in any district in which any of its "conduct" elements are committed. Some offenses are committed entirely within a single district; there they may be tried. Other crimes have elements that have occurred in more than one district. Still other crimes have been committed overseas and so have occurred outside any district. Statutory provisions, court rules, and judicial interpretations implement the Constitution's requirements and dictate where multi-district crimes or overseas crimes may be tried.

Most litigation involves either a question of whether the government's selection of venue in a multi-district case is proper or whether the court should grant the accused's request for a change of venue. The government bears the burden of establishing venue by a preponderance of the evidence. The defendant may waive trial in a proper venue either explicitly or by failing to object to prosecution in an improper venue in a timely manner.

Section 3237 of Title 18 of the *U.S. Code* supplies three general rules for venue in multi-district cases. Tax cases may be tried where the taxpayer resides. Mail and interstate commerce offenses may be tried in any district traversed during the course of a particular crime. And continuous or overlapping offenses may be tried in any district in which they begin, continue, or are completed. For example, conspiracy, perhaps the most common continuous offense, may be tried where the scheme is joined or where any overt act in its furtherance is committed. These general rules aside, a few crimes, like murder or immigration offenses, have individual venue provisions. In most instances, overseas crimes are tried in the district in which the accused is arrested or into which he is first brought from abroad.

An accused may request a change of venue for reasons of prejudice, convenience, plea, or sentence. Besides his venue rights, an accused is entitled to trial by an impartial jury. Inflammatory pre-trial publicity and other circumstances may hopelessly taint the pool of potential jurors. Nevertheless, before granting a change of venue, the courts will ordinarily exhaust alternative measures such as examination of potential jurors to ensure their impartiality. Beyond prejudice, a court may also grant a change of venue for the convenience of the accused, the government, the victim, or the witnesses. It rarely does. Finally, with the government's concurrence, the court may grant a defendant's request to plea or be sentenced in the district in which they are found.

"Venue" ordinarily refers to both where a crime may be tried and the district from which the trial jury must be drawn, although technically the latter is more properly referred to as vicinage.

Contents

Introduction 1
Threshold Issues 1
In What District Did the Crime Occur? 2
Crimes Occurring in More Than One District 3
- Continuing Offenses and Conspiracy 4
- Aiding and Abetting 6
- Other Continuous Offenses 6
- Venue in the Place of Impact 8
- Mail and Commerce Cases 9
- Tax Cases 10

Venue in Murder Cases 11
Crimes with Individual Venue Statutes 12
Venue for Crimes Committed Outside Any District 14
Venue Transfers 17
- For Prejudice 17
- For Convenience 19
- For Plea and Sentencing 20

Addendum 21
- The Merger of Venue and Vicinage 21

Contacts

Author Information 25

Introduction

The Constitution states that those accused of a federal crime shall be tried in the state in which the crime occurred and by a jury selected from the district in which the crime occurred:

> The Trial of all Crimes . . . shall be by Jury . . . held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.[1]
>
> In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . .[2]

The Federal Rules of Criminal Procedure mirror the Constitution's requirements: "Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. . . ."[3] Statutory provisions supplement the rules,[4] and the courts implement them in light of constitutional demands.[5]

Threshold Issues

Subject to constitutional or statutory limitations, the government decides where a prosecution is to begin and bears the burden of establishing that the place it has selected is permissible.[6] This

---

[1] U.S. CONST. art. III, § 2, cl. 3. This report is available in abridged form as CRS Report RS22361, *Venue: A Brief Look at Federal Law Governing Where a Federal Crime May Be Tried*, by Charles Doyle, stripped of the footnotes, most of the citations to authority, and the addendum discussing the modern merger of venue and vicinage found here.

[2] U.S. CONST. amend. VI. "Strictly speaking the former constitutional provision [U.S. Const. art. III, § 2, cl. 3] is a venue provision, since it fixes the place of trial, while the latter [U.S. Const. amend. VI] is a vicinage provision, since it deals with the place from which the jurors are to be selected. This technical distinction has been of no importance whatever. " 2 CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE, §301 (4th ed. 2009) (citing Lester B. Orfield, *Venue of Federal Criminal Cases*, 17 U. PITTS. L. REV. 375, 380 (1955)).

Professor Wright's observation may be subject to one small caveat. Following hurricane devastation in the Gulf states, Congress enacted legislation that authorizes the federal district courts to relocate outside their districts in emergency situations, 28 U.S.C. § 141(b). The provision revives the state (venue)-district (vicinage) distinction. A district court, relocated in the different state, may try criminal cases arising in its former district with the consent of the defendant, but regardless of whether it has relocated in another state or within another district within the same state unless the defendant consents, it must draw jurors from the district in which the crime occurred. *Id.* § 141(b)(2), (3).

As a general rule, each district court must establish a plan for the random selection of jurors representing "a fair cross section of the community in the district or division wherein the court convenes." *Id.* §§ 1861, 1863.

Other than Section 141 noted above there does not appear to be any authority for a district court to convene other than in the judicial district to which it is assigned.

The history of the merger of venue and vicinage is discussed in an addendum to this report.

[3] FED. R. CRIM. P. 18.

[4] *E.g.*, 18 U.S.C. §§ 3225-3244.

[5] *E.g.*, United States v. Cabrales, 524 U.S. 1 (1998); United States v. Rodriguez-Moreno, 526 U.S. 275 (1999).

[6] United States v. Thompson, 896 F.3d 155, 171 (2d Cir. 2018); United States v. Valenzuela, 849 F.3d 477, 487 (1st Cir. 2017); United States v. Rodriguez-Lopez, 756 F.3d 422, 430 (5th Cir. 2014); United States v. Lukashov, 694 F.3d 1107, 1120 (9th Cir. 2012); United States v. Cope, 676 F.3d 1219, 1124 (10th Cir. 2012); United States v. Engle, 676 F.3d 405, 412 (4th Cir. 2012).

obligation extends to every count within the indictment or information.[7] Courts differ over whether venue can be accurately described as an element of the offense,[8] but agree that the government need only establish venue by a preponderance of the evidence.[9] Moreover, venue is not considered jurisdictional.[10] Therefore, a court in an improper venue enjoys the judicial authority to proceed to conviction or acquittal, if the accused waives objection.[11] If the absence of proper venue is apparent on the face of indictment or information, failure to object prior to trial constitutes waiver.[12] If the failure of proper venue is not apparent on the face of the charging document and is not established during the presentation of the government's case in the main, objection may be raised at the close of the government's case.[13]

In What District Did the Crime Occur?

Absent a contrary statutory provision, the district in which venue is proper, the district in which the offense was committed, "the '*locus delicti* [of the charged offense,] must be determined from the nature of the crime alleged and the location of the act or acts constituting it.' In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts."[14]

---

[7] United States v. Thompson, 896 F.3d 155, 171 (2d Cir. 2018); United States v. Sterling, 860 F.3d 233, 240 (4th Cir. 2017);; United States v. Pietrantonio, 637 F.3d 865, 872 (8th Cir. 2011); United States v. Wood, 364 F.3d 704, 710 (6th Cir. 2004).

[8] United States v. Lopez, 880 F.3d 974, 982 (8th Cir. 2018) (here and hereafter unless otherwise indicated internal citations and quotation marks have been omitted) ("Proof of venue is an essential element of the Government's case. . . ."); United States v. Romans, 823 F.3d 299, 309 (5th Cir. 2016) ("This Circuit has not treated territorial jurisdiction and venue as 'essential elements' in the sense that proof beyond a reasonable doubt is required."); United States v. Rutigliano, 790 F.3d 389, 396 (2d Cir. 2015) (same); United States v. Lewis, 768 F.3d 1086, 1089 (10th Cir. 2014) ("To prove venue—which is a necessary, if often subtle, element of every criminal statute—the government must establish where the failure to register occurred … "); *Engle*, 676 F.3d at 412 (4th Cir. 2012) ("Venue is not a substantive element of a crime, but instead is similar in nature to a jurisdictional element.").

[9] *Thompson*, 896 F.3d at 171; *Lopez*, 880 F.3d at 982; United States v. Lanier, 879 F.3d 141, 147 (5th Cir. 2018); United States v. Slatten, 865 F.3d 767, 786 (D.C. Cir. 2017); United States v. Little, 864 F.3d 1283, 1287 (11th Cir. 2017); *Valenzuela*, 849 F.3d at 487; United States v. Orona-Ibarra, 831 F.3d 867, 871 (7th Cir. 2016); *Engle*, 676 F.3d at 412.

[10] United States v. Calderon, 243 F.3d 587, 590-91 (2d Cir. 2001) (citing in accord United States v. Meade, 110 F.3d 190, 200 (1st Cir. 1997); United States v. Allen, 24 F.3d 1180, 1183 (10th Cir. 1994); United States v. Brown, 583 F.2d 915, 198 (7th Cir. 1978); United States v. Walden, 464 F.2d 1015, 1016 n.1 (4th Cir. 1972); Yeloushan v. United States, 339 F.2d 533, 536 (5th Cir. 1964)); *see also* United States v. Cordova, 157 F.3d 587, 597 n.3 (8th Cir. 1998). A casual reading might suggest that the Sixth Amendment affords a defendant the right to an impartial jury drawn from the district where the crime occurred, but that Article III imposes a procedural obligation upon the court to a conduct the trials in criminal cases in the states where they occur. Under this reading, an accused might waive the right to an impartial jury, but not the requirements imposed upon the court, or so it might seem. The case law, however, is clearly to the contrary.

[11] *Engle*, 676 F.3d at 413; *see also* United States v. Obak, 884 F.3d 934, 937 (9th Cir. 2018) ("By entering a guilty plea, Obak waived any objection as to a defect in venue."); United States v. Kierkow, 872 F.3d 236, 243 n.3 (5th Cir. 2017); United States v. Chi Tong Kuok, 671 F.3d 931, 937 n.4 (9th Cir. 2012); United States v. Matera, 489 F.3d 115, 124 (2d Cir. 2007) (defendant waived when he failed to object to venue during district court proceedings).

[12] United States v. Rodriguez-Lopez, 756 F.3d 422, 430 (5th Cir. 2014); United States v. Kelly, 535 F.3d 1229, 1234 (10th Cir. 2008); United States v. Novak, 443 F.3d 150, 161 (2d Cir. 2006); United States v. Grenoble, 413 F.3d 569, 573 (6th Cir. 2005).

[13] *Rodriguez-Lopez*, 756 F.3d at 430; United States v. Collins, 372 F.3d 629, 633 (4th Cir. 2004); United States v. Roberts, 308 F.3d 1147, 1152 (11th Cir. 2002); United States v. Ringer, 300 F.3d 788, 790 (7th Cir. 2002).

[14] United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999) (quoting United States v. Cabrales, 524 U.S. 1, 6-7 (1998), and United States v. Anderson, 328 U.S. 699, 703 (1946)); *see also* United States v. Kirk Tang Yuk, 885 F.3d

The words Congress uses when it drafts a criminal proscription will establish where the offense occurs and therefore the district or districts in which venue is proper. For some time, the courts and academics used a so-called "verb test" as one means of identifying where an offense was committed. So, for example, an offense that applied to anyone who received a bribe could be tried where a bribe was received.[15] The test may still be useful to determine where venue is proper, but it is not necessarily the last word.[16] As the Supreme Court explained in *United States v. Rodriguez-Moreno*, "the 'verb test' certainly has value as an interpretative tool; it cannot be applied rigidly, to the exclusion of other relevant statutory language. The test unduly limits the inquiry into the nature of the offense and thereby creates a danger that certain conduct prohibited by statute will be missed."[17] The test endorsed in *Rodriguez-Moreno* looks to where the "conduct" element or elements of the offense occur.[18]

Crimes Occurring in More Than One District

Other than when the accused seeks a change of venue, venue is only an issue when a crime occurs, or can be said to occur, in more than one district or outside of any district. Section 3237 governs venue for certain multi-district crimes.[19] It consists of three parts: one for continuing offenses generally, another for offenses involving elements of the mails or interstate commerce, and a third for tax offenses.

The first paragraph of Section 3237 is the oldest portion of the statute. Originally enacted during Reconstruction as part of the general conspiracy statute now found in 18 U.S.C. § 371,[20] the Revised Statutes made it applicable to all multi-district federal crimes.[21] Slightly modified in the 1948 revision, it now provides

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than

57, 69 (2d Cir. 2018); United States v. Sterling, 860 F.3d 233, 240-41 (4th Cir. 2017).

[15] Armistead M. Dobie, *Venue in Criminal Cases in the United States District Court*, 12 VA. L. REV. 287, 289-90 (1926) (emphasis in the original) ("All federal crimes are statutory, and these crimes are often defined, hidden away amid pompous verbosity, in terms of a single verb. That essential verb usually contains the key to the solution of the question: In what district was the crime committed ... So in the celebrated Burton case, twice before the Supreme Court, the statute said: 'No Senator * * * shall *receive or agree to receive* any compensation' for a certain kind of service. In the first opinion, the question was where was the compensation *received*, at St. Louis, where the check was mailed and where the ban was on which it was drawn, or in Washington, where defendant deposited it in another bank which placed the amount of the check unconditionally to his credit. The *receipt* was held to be in Washington and the St. Louis conviction reversed [, *United States v. Burton*, 196 U.S. 283 (1906)]. But the second opinion dealt with where the defendant *agreed to receive* the compensation. This the court said, was in St. Louis, the place where the *agreement* was finally accepted and ratified [, *United States v. Burton*, 202 U.S. 344(1906)]"); *see also* United States v. Palma-Ruedas, 121 F.3d 841, 847-51 (3d Cir. 1997), *rev'd sub nom.,* United States v. Rodriguez-Moreno, 526 U.S. 275 (1999).

[16] *Sterling*, 860 F.3d at 241 ("In determining the offense's 'essential conduct' elements, courts may start by analyzing the key 'verbs' or actions sanctioned by the statute, thought his is not the sole consideration.").

[17] *Id.* at 280. For a critical review of *Rodriguez-Moreno see* Todd Lloyd, *Stretching Venue Beyond Constitutional Recognition*, 90 J. CRIM. L. & CRIMINOLOGY 951 (1999).

[18] *Rodriguez-Moreno*, 526 U.S. at 280.

[19] 18 U.S.C. § 3237.

[20] 14 STAT. 484 (1867).

[21] REV. STAT. § 731 (1878).

> one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.[22]

Over the years, there has been a certain ebb and flow in the Supreme Court's reading of the venue requirements of the section. The Court first considered the provision in 1890 in *Palliser v. United States*, when it held that prosecution of an offense under the postal bribery statute might be held in the District of Connecticut in which the letter offering a bribe was received even though the accused had acted entirely outside of the district.[23] The Court expressed no opinion as to whether the offense might also have been tried in the district in New York from which the letter had been sent.[24] Two years later, the Court held that the trial of an indictment for causing the mail delivery of lottery material might be held in the district in which the mail was delivered, but observed that "perhaps" trial might also be held in the district in which the material was deposited in the mail.[25]

In later years, the Court concluded that the failure to file required documentation with immigration officials was not a continuous offense and must be prosecuted in the district where the document had to be filed;[26] but that an alien crewman's unlawfully remaining in the United States was a continuous offense and consequently that venue "lies in any district where the crewman willfully remains."[27]

In 1998, in *United States v. Cabrales*, the Supreme Court held that money laundering and the crimes that generated the laundered funds did not *automatically* form one continuous criminal episode. Thus, Cabrales's offense of laundering drug proceeds, generated by drug trafficking in Missouri, but laundered in Florida, should not have been tried in Missouri.[28] The Court was quick to point out, however, that under different circumstances, venue over a money laundering charge might be proper in the district in which its predicate offenses occurred.[29] The next year, the Court confirmed in *United States v. Rodriguez-Moreno* that venue is proper in any district in which a conduct element of the offense occurs.[30]

Continuing Offenses and Conspiracy

Conspiracy, with its multiple players with multiple roles, would seem to fit Section 3237's description of a crime that may begin, continue, or end in more than one district. The crime of conspiracy under the general statute is not complete until one of the conspirators takes some

---

[22] 18 U.S.C. § 3237.

[23] 136 U.S. 257, 267-68 (1890).

[24] *Id.* at 268.

[25] Horner v. United States, 143 U.S. 207, 211-12 (1892).

[26] United States v. Lombardo, 241 U.S. 73, 76-9 (1916).

[27] United States v. Cores, 356 U.S. 405, 409 (1958).

[28] United States v. Cabrales, 524 U.S. 1, 5-6 (1998).

[29] *Id*. at 7-8 ("Notably, the counts at issue do not charge Cabrales with conspiracy; they do not link her to, or assert her responsibility for, acts done by others. Nor do they charge her as an aider or abettor in the Missouri drug trafficking ... Cabrales is charged in the money-laundering counts with criminal activity 'after the fact' of an offense begun and completed by others…. Money laundering ... arguably might rank as a continuing offense triable in more than one place, if the launderer acquired the funds in one district and transported them into another. But that is tellingly not this case.").

[30] 526 U.S. 275, 280 (1999). In 2001, Congress also amended the money laundering statute to permit trial where the money-generating crime occurred if defendant took part in moving the money from the site of the crime to place where the laundering occurred. Pub. L. No. 107-56, §1004, 115 Stat. 392 (2001), 18 U.S.C. § 1956(i); *see e.g.*, United States v. Myers, 854 F.3d 341, 350 (6th Cir. 2017).

affirmative action in furtherance of the criminal scheme.[31] This affirmative action (overt act) is an element of the crime.[32] In such cases, it would come as no surprise if venue were said to be proper wherever an overt act was committed, that is, wherever a conduct element of the crime occurred. An overt act, however, is not an element of several individual federal conspiracy statutes, such as the controlled substance conspiracy statute, for example.[33] In such cases, is venue nevertheless proper wherever an overt act in furtherance of the conspiracy is committed? It appears so.

Some time ago, the Supreme Court pointed out that conspiracy could be considered something akin to a continuous offense. Conspiracy, it declared, in *Hyde v. United States*, may be tried in any district in which an overt act in its furtherance is committed, at least when the conspiracy statute has an overt act requirement.[34] Moreover, the Court in *Hyde* implied that even under a conspiracy statute with no overt act requirement prosecution might be had wherever an overt act occurred.[35] Without apparent exception, the lower federal appellate courts have followed *Hyde's* lead and found venue proper for trial of conspiracy charges in any district in which an overt act is committed, regardless of whether the conspiracy statute in question requires proof of an overt act[36] or not.[37] It is interesting to note that in *Cabrales* when the Court observed that the money

[31] 14 STAT. 484 (1867), as amended now, 18 U.S.C. § 371 (emphasis added) ("If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, *and one or more of such persons do any act to effect the object of the conspiracy*, each shall be fined under this title or imprisoned not more than five years, or both.").

[32] Fiswick v. United States, 329 U.S. 211, 216 (1946); United States v Doggart, 906 F.3d 506, 511 (6th Cir. 2018); United States v. Martinez, 900 F.3d 721, 728 (5th Cir. 2018); United States v. Acevedo-Hernandez, 898 F.3d 150, 161 (1st Cir. 218).

[33] United States v. Shabani, 513 U.S. 10, 17 (1994) (21 U.S.C. § 846, conspiracy to violate the Controlled Substances Act, has no overt act requirement); Whitfield v. United States, 543 U.S. 209, 214 (2005) (18 U.S.C. § 1956, conspiracy to commit money laundering, has no overt act requirement).

[34] Hyde v. United States, 225 U.S. 347, 360-66 (1912).

[35] "The court [of appeals], passing on the ruling of the trial court, said by District Judge Carland …[a]t common law . . . no overt act need be shown or ever performed to authorize a conviction. If conspirators enter into the illegal agreement in one county, the crime is perpetrated there, and they may be immediately prosecuted; but the proceedings against them must be in that county. If they go into another county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement ... If this was the law of venue in conspiracies at common law, where proof of an overt act was not necessary to show a completed offense, the same rule can be urged with much greater force [here], as the offense described [here] for all practical purposes is not complete until an overt act is committed ... It seems clear, then, that whether we place reliance on the common law or on §731, Rev. Stat., the venue of the offense was correctly laid [where an overt act occurred]." *Id.* at 365-66. For a more extensive discussion of *Hyde see* Norman Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 UCLA L. REV. 751 (1962).

[36] United States v. Lange, 834 F.3d 58, 70 (2d Cir. 2016); United States v. Fahnbulleh, 752 F.3d 470, 477 (D.C. Cir. 2014); United States v. Day, 700 F.3d 713, 273 (4th Cir. 2012); United States v. Bradley, 644 F.3d 1213, 1253-254 (11th Cir. 2011). Each of these cases involves conspiracy under 18 U.S.C. § 371 which carries an overt act requirement.

[37] United States v. Kirk Tang Yuk, 885 F.3d 57, 71 (2d Cir. 2018); United States v. Lopez, 880 F.3d 974, 982 (8th Cir. 2018); United States v. Elliott, 876 F.3d 855, 861 (6th Cir. 2017); United States v. Kiekow, 872 F.3d 236, 243 (5th Cir. 2017); United States v. Valenzuela, 849 F.3d 477, 487-88 (1st Cir. 2017); United States v. Watson, 717 F.3d 196, 198 (D.C. Cir. 2013); United States v. Gonzalez, 683 F.3d 1221, 1224-225 (9th Cir. 2012); United States v. Acosta-Gallardo, 656 F.3d 1109, 1118 (10th Cir. 2011); United States v. Crozier, 259 F.3d 503, 519 (6th Cir. 2001). Each of these cases involves conspiracy under 21 U.S.C. § 846 which does not include an overt act requirement (United States v. Shabani, 513 U.S. 10, 11 (1994)); *see also* United States v. Moussaoui, 591 F.3d 263, 300 (4th Cir. 2010) (venue was proper in the Eastern District of Virginia when co-conspirators committed overt acts in furtherance of conspiracies outlawed under different statutes, some of which had an overt act requirement (*e.g.*, 18 U.S.C. § 1117) and some of which did not (*e.g.*, 18 U.S.C. § 2332a)); United States v. Royer, 549 F.3d 886, 896-97 (2d Cir. 2008) (RICO conspiracy under 18 U.S.C. § 1962(d), no overt act requirement); United States v. Rommy, 506 F.3d 108, 119-20 (2d

launderer might have been tried as a conspirator in the district where the predicate offense (drug trafficking) occurred, it referred to the general conspiracy statute that requires an overt act (18 U.S.C. § 371) rather than the equally applicable drug trafficking conspiracy statute that does not (21 U.S.C. § 846).[38] Nevertheless, six years later in *Whitfield v. United States* the Court observed that "this Court has long held that venue is proper in any district in which an overt act in furtherance of the conspiracy was committed, even where an overt act is not a required element of the conspiracy offense."[39] At least one federal appellate court has muffled the impact of the overt act rule by limiting it to cases in which a co-conspirator's venue-expanding overt act is foreseeable by his fellows.[40]

Aiding and Abetting

Those who aid and abet the commission of a federal crime are punishable as principals.[41] The government may try aiders and abettors either where they provided assistance or where the underlying offense may be prosecuted.[42]

Other Continuous Offenses

As early as 1908 in *Armour Packing Co. v. United States*,[43] the Supreme Court upheld a conviction following a trial in the Western District of Missouri for the offense of continuous carriage by rail of the defendant's products from Kansas to New York at an illegally reduced rate. The Court concluded that for venue purposes "[t]his is a single continuing offense … continuously committed in each district through which the transportation is received at the prohibited rate."[44] The Court's most recent venue decision in 1999 confirmed the continued

---

Cir. 2007) (conspiracy under 21 U.S.C. § 963, no overt act requirement). Note that the money laundering statute has its own venue provision which among other things declares that conspiracy to violate its provisions may be tried wherever an overt act in furtherance of the scheme is committed. 18 U.S.C. § 1956(i).

[38] "If the Government can prove the [conspiratorial] agreement it has alleged, Cabrales can be prosecuted in Missouri for that confederacy, and her money laundering in Florida could be shown as overt acts in furtherance of the conspiracy. See 18 U.S.C. § 371 (requiring proof of an act to effect the object of the conspiracy)," United States v. Cabrales, 524 U.S. 1, 9 (1998).

[39] Whitfield v. United States, 543 U.S. 209, 219 (2004). At least one critic has suggested that the rule is overdue for revision, Robert L. Ullmann, *One Hundred Years After* Hyde*: Time to Expand Venue Safeguards in Federal Criminal Conspiracy Cases?* 52 SANTA CLARA L. REV. 1003 (2012).

[40] *Kirk Tang Yuk*, 885 F.3d at 69 ("In our Circuit, the venue analysis does not end as to all defendants charged with a conspiracy when we find a single overt act performed in the district of prosecution, however. We have interpreted the venue requirement to demand some sense of venue having been freely chosen by the defendant. We have said that it must have been reasonably foreseeable to each defendant charged with the conspiracy that a qualifying overt act would occur in the district where the prosecution is brought."). Several other circuits, however, have declined to accept a "foreseeability" theory, *see, e.g.*, United States v. Renteria, 903 F.3d 326, 329-30 (3d Cir. 2018); United States v. Gonzalez, 683 F.3d 1221, 1226 (9th Cir. 2012); United States v. Johnson, 510 F.3d 521, 527 (4th Cir. 2007).

[41] 18 U.S.C. § 2.

[42] "Where guilt of a substantive offense is premised on aiding and abetting, '[v]enue is proper where the defendant's accessorial acts were committed or where the underlying crime occurred.'" United States v. Lange, 834 F.3d 58, 69 (2d Cir. 2016) *see also* United States v. Thomas, 690 F.3d 358, 370 (5th Cir. 2012); United States v. Stewart, 256 F.3d 231, 244 (4th Cir. 2001); *cf. Cabrales*, 524 U.S. at 7 (suggesting that venue for aiding and abetting is proper in the district in which the incriminating assistance is provided) ("Notably, the counts at issue do not charge Cabrales with conspiracy… Nor do they charge here as an aider or abettor in the Missouri drug trafficking" in laundering the resulting drug proceeds in Florida.).

[43] 209 U.S. 56 (1908).

[44] *Id.* at 77.

vitality of this view when it held that if Congress so crafts a criminal offense as to embed as one of its elements a predicate continuing offense, venue over the new crime is proper either wherever the new offense is committed or wherever the continuing predicate offense occurs. In *United States v. Rodriguez-Moreno*,[45] the defendant had been tried in New Jersey for using a firearm in Maryland during and in relation to a crime of violence, *i.e.,* a kidnapping that had begun in New Jersey. The Court pointed out that the crime in question, 18 U.S.C. § 924(c)(1), "contains two distinct conduct elements—as is relevant in this case, the 'using and carrying' of a gun and the commission of a kidnaping."[46] A defendant commits a crime and may be tried where *he* commits any of its *conduct* elements, it explained.[47] Kidnaping is a crime that continues from capture until release and therefore can be tried in any place from, through, or into which the victim is taken, and the appended gun charge travels with it. As the Court explained:

> The kidnaping, to which the §924(c)(1) offense is attached, was committed in all of the places that any part of it took place, and venue for the kidnaping charge against respondent was appropriate in any of them. (Congress has provided that continuing offenses can be tried 'in any district in which such offense was begun, continued, or completed,' 18 U.S.C. § 3237(a).) Where venue is appropriate for the underlying crime of violence [, in this case kidnaping,] so too it is for the § 924(c)(1) offense.[48]

In addition to kidnaping, the lower federal appellate courts have found venue proper based on the continuing nature of violations involving, for example:

- failure to pay child support (18 U.S.C. § 228).[49]
- unlawful possession of a firearm (18 U.S.C. § 922(g));[50]
- false statements (18 U.S.C. § 1001);[51]
- mail fraud (18 U.S.C. § 1341);[52]
- wire fraud (18 U.S.C. § 1343);[53]
- bank fraud (18 U.S.C. § 1344);[54]
- violent crimes in aid of racketeering (18 U.S.C. § 1959);[55] and

[45] 526 U.S. 275, 281 (1999).

[46] *Id*. at 280.

[47] This is the difference between *Cabrales* and *Rodriguez-Moreno*: "The existence of criminally generated proceeds [in *Cabrales*] was a circumstance element of the offense but the proscribed conduct, defendant's money laundering activity, occurred after the fact of an offense begun and completed by others. [In *Rodriguez-Moreno*], by contrast, given the 'during and in relation to' language, the underlying crime of violence is a critical part of the §924(c)(1) offense," *Rodriguez-Moreno*, 526 U.S. at 280-81 n.4.

[48] *Id.* at 282.

[49] United States v. Muench, 153 F.3d 1298, 1303-305(11th Cir. 1998); United States v. Crawford, 115 F.3d 1397, 1403-406 (8th Cir. 1997).

[50] United States v. Ellis, 622 F.3d 784, 793 (7th Cir. 2010).

[51] United States v. Brown, 898 F.3d 636, 639-41 (5th Cir. 2018); United States v. Smith, 641 F.3d 1200, 1208 (10th Cir. 2011) ("We have held that giving a false statement may be a continuing offense, where the state is made in more than one district. However, that does not mean that all violations of §1001(a)(2) are continuing violations."); United States v. Ramirez, 420 F.3d 134, 142-43 (2d Cir. 2005).

[52] United States v. Wood, 364 F.3d 704, 710 (6th Cir. 2004).

[53] United States v. Ebersole, 411 F.3d 517, 525-27 (4th Cir. 2005); United States v. Pace, 314 F.3d 344, 350 (9th Cir. 2002); United States v. Kim, 246 F.3d 186, 191-92 (2d Cir. 2001).

[54] United States v. Scott, 270 F.3d 30, 36 (1st Cir. 2001).

[55] United States v. Saavedra, 223 F.3d 85, 91-2 (2d Cir. 2000).

- possession of controlled substances with the intent to distribute (21 U.S.C. § 841).[56]

Venue in the Place of Impact

Continuing offenses and the first paragraph of subsection 3237(a) present one other puzzle: is venue proper in any district in which the crime's *effects* are felt? The Court expressly declined to address the issue in *Rodriguez-Moreno*: "The Government argues that venue also may permissibly be based upon the effects of a defendant's conduct in a district other than the one in which the defendant performs the acts constituting the offense. Because this case only concerns the *locus delicti*, we express no opinion as to whether the Government's assertion is correct."[57] The government's brief in the case declared that "[v]enue may also be based on the effects of a defendant's conduct in another district," and cited *Armour Packing Co.* (multi-state rail transportation at unlawful rate), *supra*, and the mail cases discussed below.[58] The brief also cited lower court obstruction of justice and Hobbs Act cases.[59]

The Hobbs Act outlaws the obstruction of interstate or foreign commerce through the use of violence or extortion.[60] Venue for a Hobbs Act violation is generally considered proper in any district in which there is an obstruction of commerce.[61] An earlier line of cases suggested that an obstruction of justice—intimidation or bribery of witness, bail jumping, or the like—might be tried in the district in which the proceedings were conducted even when the act of obstruction occurred elsewhere.[62] The line gave birth to a suggestion that venue might be predicated upon the impact of the crime within a particular district especially when the offense involved other "substantial contacts" with the district of victimization.[63]

---

[56] United States v. Solis, 299 F.3d 420, 445 n.76 (5th Cir. 2002); United States v. Uribe, 890 F.2d 554, 559 (1st Cir. 1989); United States v. Baskin, 886 F.2d 383, 388 (D.C. Cir. 1989).

[57] 526 U.S. at 279 n.2.

[58] Brief for the United States at 16-17, United States v. Rodriguez-Moreno, 526 U.S. 275 (1999).

[59] *Id.*

[60] "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a).

[61] United States v. Davis, 689 F.3d 179, 186 (2d Cir. 2012) ("Because the Hobbs Act criminalizes a particular of 'robbery'—*i.e.*, one that 'obstructs, delays, or affects commerce,' *id.* § 1951(a)—venue for a substantive Hobbs Act charge is 'proper in any district where interstate commerce is affected or the alleged acts took place.'"); United States v. Lewis, 797 F.2d 358, 367 (7th Cir. 1986) ("[V]enue for a Hobbs Act prosecution lies in any district where the requisite effect on commerce is present, even if the acts of extortion occur outside the jurisdiction.").

[62] United States v. Frederick, 835 F.2d 1211, 1213-214 (7th Cir. 1988); United States v. Reed, 773 F.2d 477, 484-86 (2d Cir. 1985); United States v. Kibler, 667 F.2d 452, 454-55 (4th Cir. 1982); United States v. Barham, 666 F.2d 521, 523-24 (11th Cir. 1982); United States v. Tedesco, 635 F.2d 902, 904-906 (1st Cir. 1980); United States v. O'Donnell, 510 F.2d 1190, 1192-195 (6th Cir. 1975); *but see* United States v. Swann, 441 F.2d 1053, 1055 (D.C. Cir. 1971); *see generally*, Note, *Criminal Venue in the Federal Courts: The Obstruction of Justice Puzzle*, 82 MICH. L. REV. 90 (1983). In 1996, Congress amended the obstruction of justice statute to permit trial either "in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred." Pub. L. No. 104-214, §1(2), 110 Stat. 3017 (1996), 18 U.S.C. §1512(i).

[63] *Reed*, 773 F.2d at 481 (emphasis added) ("[A] review of relevant authorities demonstrates that there is no single defined policy or mechanical test to determine constitutional venue. Rather, the test is best described as a substantial contacts rule that takes into account a number of factors—the site of the defendant's acts, the elements and nature of the crime, *the locus of the effect of the criminal conduct*, and the suitability of each district for accurate factfinding.");

After *Rodriguez-Moreno*, the courts continue to refer to an "effects" or "substantial contacts" test for venue.[64] Some have held that the effect must also constitute a "conduct element" under the statute defining the offense;[65] and that venue may not be based on elements of the offense which are not conduct elements.[66] Yet, the courts are divided over the question of whether venue can be proper in a district based only on effect or substantial contacts there.[67]

Mail and Commerce Cases

The second paragraph of Section 3237(a) authorizes the prosecution of offenses involving importing, travel in interstate or foreign commerce, or use of the mail in any district from, through, or into which "commerce, mail matter, or [an] imported object or person moves."[68] The

see also United States v. Newsom, 9 F.3d 337, 339 (4th Cir. 1993); United States v. Beddow, 957 F.2d 1330, 1336 (6th Cir. 1992) ("[T]he funds involved in both money laundering counts were acquired by selling drugs in the Western District of Michigan ... Under the substantial contacts test used in the Sixth Circuit, venue was proper in the Western District of Michigan"); United States v. Williams, 788 F.2d 1213, 1215 (6th Cir. 1986) (applying "the substantial contacts test as well as the rationale and framework of analysis articulated by the *Reed* court" to venue in a bail jumping case); United States v. Bagnell, 679 F.2d 826, 832 (11th Cir. 1982) ("[P]rosecution [of the use of interstate carrier to transport obscene material] in the district of receipt is eminently reasonable in view of the fact that it is the recipient community that suffers the deleterious effects of pornography distribution.").

[64] United States v. Kirk Tang Yuk, 885 F.3d 57, 70 (2d Cir. 2018) (quoting United States v. Lange, 834, F.3d 58, 71 (2d Cir. 2016)) ("We have 'occasion[ally] … supplemented our venue inquiry with a substantial contacts test that takes into account a number of factors … include[ing] the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of the [venue] for accurate factfinding. We have acknowledged that this is not a formal constitutional test but have nevertheless found it to be a valuable safeguard for a defendant whose contacts with the district of prosecution are minimal.").

[65] United States v. Bowens, 224 F.3d 302, 311 (4th Cir. 2000) ("[T]he government argues, venue for a § 1071 prosecution should lie in the district where the effects of the criminal conduct are felt ... Instead, we conclude that the Supreme Court's recent decisions in *Cabrales* and *Rodriguez-Moreno* require us to determine venue solely by reference to the essential conduct elements of the crime, without regard to Congress's purpose in forbidding the conduct."); *see also*, United States v. Coplan, 703 F.3d 46, 78-9 (2d Cir. 2012); United States v. Oceanpro Industries. Ltd., 674 F.3d 232, 238-39 (4th Cir. 2012).

[66] United States v. Clenney, 434 F.3d 780, 781-82 (5th Cir. 2005) ("The government argues that venue exists under the terms of the statute [(18 U.S.C. § 1204)] because intent to obstruct the lawful exercise of parental rights is an element of the offense, and Carmichael's parental rights were violated in the Northern District. We disagree, because this element merely speaks to the offender's *mens rea* as he commits the conduct essential to the crime; it is plainly not an 'essential conduct element' as required by *Rodriguez-Moreno*."); United States v. Ramirez, 420 F.3d 134, 144-45 (2d Cir. 2005) ("While a scheme to defraud is certainly one of three essential elements of mail fraud, it is not an essential conduct element ... [Thus,] having devised or intending to devise a scheme or artifice to defraud, while an essential element, is not an essential conduct element for purposes of establishing venue"); United States v. Strain, 396 F.3d 689, 694 (5th Cir. 2005) ("The issuance of the warrant and Strain's knowledge of it, however, are 'circumstance elements' of the offense of harboring, insofar as they do not involve any proscribed conduct by the accused. As such neither may serve as a basis for establishing venue.").

[67] United States v. Lange, 834 F.3d 58, 71 (2d Cir. 2016) ("The substantial contacts inquiry is not a 'formal constitutional test,' but instead is a useful guide to consider 'whether a chosen venue is unfair or prejudicial to a defendant.'"); United States v. Auernheimer, 748 F.3d 525, 537 (3d Cir. 2014) ("The Government has not cited, and we have not found, any case where the locus of the effects, standing by itself, was sufficient to confer constitutionally sound venue."); *but see* United States v. Elliott, 876 F.3d 855, 862 (6th Cir. 2017) (citing pre-*Rodriguez-Moreno* case law for the proposition that venue in the case of Florida pill mill defendants was proper in the Eastern District Kentucky because 20% of the Florida business's customers drove from Kentucky to obtain their illicit prescriptions); United States v. Orona-Ibarra, 831 F.3d 867, 872 (7th Cir. 2016) ("[T]here is no … mechanical test to determine constitutional venue. Rather, the test is best described as substantial contacts rule …").

[68] "... Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves," 18 U.S.C. § 3237(a).

paragraph first appeared in the revision of Title 18 of the *United States Code* in 1948. In 1944, the Supreme Court in *United States v. Johnson* had held that under the statute at issue an unlawful use of the mail had to be tried in the place from which the mail was sent rather than in the place in which it was received.[69] The Reviser's Notes that accompany Section 3237 explain that the subparagraph is a response to the decision in *Johnson*.[70] One scholar has questioned whether the Court's *Johnson* decision warranted such an expansive response.[71] Perhaps for this reason although the subsection has been used under a wide range of circumstances, its invocation has not always been successful.[72]

Tax Cases

The tax subsection of the multi-district provision, Subsection 3237(b), is in fact a limited transfer provision under which the accused may ask to be tried in the district in which he resided at the time when the alleged offense occurred.[73] Subsection 3237(b) applies only in the case of

---

[69] United States v. Johnson, 323 U.S. 273, 277-78 (1944).

[70] 18 U.S.C. § 3237, Historical and Revision Notes (citations omitted) (" … The [second] paragraph of the revised section was added to meet the situation created by the decision of the Supreme Court of the United States in *United States v. Johnson*, which turned on the absence of a special venue provision in the Dentures Act, section 1821 of this revision. The revised section removes all doubt as to the venue of continuing offenses and makes unnecessary special venue provisions except in cases where Congress desires to restrict the prosecution of offenses to particular districts as in section 1073 of this revision.").

[71] "Four years earlier the Supreme Court had held that an offense under the Federal Denture Act was complete when the goods are deposited in the mails, and that prosecution could not be had at the place of delivery. This construction was required the Court thought, by 'the large policy back of the constitutional safeguards.' The Reviser of the Criminal Code read that decision, however, as having 'turned on the absence of a special venue provision in the Denture Act' and added the second paragraph to § 3237(a) that 'removes all doubt as to the venue of continuing offenses and makes unnecessary special venue provisions* * *.' This of course presupposes that wide choice of venue is necessarily a good thing, a view prosecutors are likely to share but that many persons, include not infrequently a majority of the Supreme Court, have rejected," 2 CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE, § 303 (4th ed. 2009 & 2018 Supp.).

[72] *Id.* and cases cited therein; *see also* United States v. Obak, 884 F.3d 934, 937 (9th Cir. 2018) ("An offense involving 'the use of the mails' is a continuing offense, and venue is proper 'in any district from, through, or into which' the mail moves. 18 U.S.C. § 3237(a). This framework places venue in both Guam and Washington State. Obak's crime began in Washington State, where the packages of methamphetamine were placed in the mail, and continued and/or was completed in Guam."); United States v, Cameron, 699 F.3d 621, 636 (1st Cir. 2012) ("Transporting and receiving child pornography via Internet services ... are both crimes involving interstate commerce" for purposes of the second paragraph of § 3237(a)); United States v. Kapordelis, 569 F.3d 1291, 1307-308 (11th Cir. 2009) (venue for prosecution of use of a minor in the production of child pornography, knowingly transported in interstate commerce, was proper in the district through which it was transported); United States v. Cole, 262 F.3d 704, 710 (8th Cir. 2001) (venue for prosecution of a charge of interstate transportation for immoral purposes was proper under the second paragraph of §3237(a) in the district in which the victim was transported); United States v. Sutton, 13 F.3d 595, 598-99 (2d Cir. 1994) (venue for prosecution of a charge of producing and transferring false documents was proper under the second paragraph of §3237(a) either in the district in which they were produced or the district into which they were mailed); *contra* United States v. Morgan, 393 F.3d 192, 197-200 (D.C. Cir. 2004) (venue in the district for the District of Columbia was not proper under the second paragraph of §3237(a) for prosecution of a charge of receiving, in Maryland, federal property stolen in the District of Columbia); United States v. Villarini, 238 F.3d 530, 535-36 (4th Cir. 2001) (venue for prosecution of a money laundering charge was not proper under the second paragraph of §3237(a) in the district where the offenses which generated the tainted cash were committed when the laundering occurred elsewhere); United States v. Brennan, 183 F.3d 139, 144-49 (2d Cir. 1999) (venue for prosecution of a mail fraud charge was not proper under the second paragraph of §3237(a) in a district through which mail passed from another district in which it was mailed to destinations outside the district of transit).

[73] "Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1986, or where venue for prosecution of an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law) is based solely on a mailing to the Internal

prosecutions under 26 U.S.C. § 7203 (willful failure to file a return, supply information or pay a tax),[74] or, if the government seeks to prosecute in a district where venue exists solely because of a mailing to the Internal Revenue Service, under 26 U.S.C. § 7201 (attempted tax evasion) or § 7206(1), (2), or (5) (various frauds and false statements).[75] Congress added Subsection 3237(b) in 1958 under the view that prosecution in the district where a return was received or due rather than the district in which the taxpayer resided visited inappropriate inconvenience and expense upon taxpayers, their attorneys and witnesses.[76] A qualified defendant must file his request to be tried in his home district within 20 days.[77] The court may not grant a request that is not timely.[78]

Venue in Murder Cases

Sections 3235 and 3236 provide special venue requirements in murder cases.[79] Section 3235 dates from the First Congress,[80] and states that "the trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience." The cases under the section are few and rarely seem to favor the accused. For instance, more than one court has held that the section does not apply to offenses punishable with death unless the charges are for "unitary" murder offenses.[81] As in other instances, the benefits of Section 3235 can be waived if the accused fails to move to dismiss for improper venue.[82] Moreover, the determination that the benefit can be denied in the face of "great inconvenience" is a matter within the trial court's discretion.[83] Courts have found great inconvenience when there

---

Revenue Service, and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided,* That the motion is filed within twenty days after arraignment of the defendant upon indictment or information." 18 U.S.C. § 3237(b).

[74] As originally enacted, Subsection 3237(b) included only 26 U.S.C. §§ 7201 and 7206(1), (2), and (5) cases. Congress added Section 7203 cases in 1966 for the same reasons as the originals: relative cost and inconvenience to the taxpayers, their attorneys, and witnesses, H. R. REP. NO. 89-1915, at 5 (1966).

[75] The transfer option for cases under 26 U.S.C. §§ 7201 (attempted tax evasion) or 7206(1),(2), or (5) (various frauds and false statements) does not apply when venue is proper in a nonresidential district for reasons other than a mailing, United States v. Humphreys, 982 F.2d 254, 260 (8th Cir. 1993); United States v. Barrett, 153 F. Supp. 3d 552, 558 (E.D.N.Y. 2015).

[76] "The cost and inconvenience to the defendant may be substantial especially in the case of an extended trial. The additional expense to the defendant of living away from home, the problem of getting his local attorneys to leave their offices and practices for several days or weeks and the increased cost incurred thereby, the inconvenience to witnesses, these are all factors which the committee believes place a heavy burden upon the defendant which can be better borne by the Government. The committee believes, further, that, in the type of case covered by this bill, the acts for which the defendant is really being tried are generally committed in the district in which he resides and certainly bear little or no relationship to the place where his tax return is received," H.R REP. NO. 85-1952, at 2 (1958); *see also,* S. REP. NO. 85-1890, at 2-3 (1958).

[77] 18 U.S.C. § 3237(b).

[78] United States v. Snipes, 611 F.3d 855, 864 (11th Cir. 2010).

[79] 18 U.S.C. §§ 3235, 3236.

[80] 1 STAT. 88 (1789).

[81] United States v. Barnette, 211 F.3d 803, 814 (4th Cir. 2000) (18 U.S.C. § 924(c), (j) (use or carriage of a firearm during the commission of crime of violence or drug trafficking crime causing death)); United States v. Aiken, 76 F. Supp. 2d 1346, 1349-351 (S.D. Fla. 1999) (18 U.S.C. § 1959 (murder in aid of racketeering)).

[82] Hayes v. United States, 296 F.2d 657, 667 (8th Cir. 1961); Bickford v. Looney, 219 F.2d 555, 556 (10th Cir. 1955); United States v. Taylor, 316 F. Supp. 2d 722, 728 (N.D. Ind. 2004).

[83] United States v. Parker, 103 F.2d 857, 861 (3d Cir. 1939); *Barrett*, 82 F.2d 528, 534 (7th Cir. 1936); Davis v. United States, 32 F.2d 860, 860 (9th Cir. 1929).

was no federal courthouse within the county in which the crime was committed;[84] when a majority of the government's witnesses were located outside of the county in which the crime was committed;[85] and when observance would overburden court resources.[86]

Section 3236 provides that for venue purposes in murder and manslaughter cases, the offense will be deemed to have occurred where the death-causing act is committed.[87] Congress enacted Section 3236 in apparent reaction to a Supreme Court observation that a federal murder case could not be brought if an injury were inflicted within a district in the United States but death occurred elsewhere.[88] Here too the case law is sparse. Two trial courts have held that Section 3236 only applies to "unitary" murder cases and thus does not apply to murders committed in aid of racketeering in violation of 18 U.S.C. § 1959.[89] A third held that Section 3236 must yield where Section 3237 (venue in multiple districts) is applicable.[90] And an appeals court has held that under Section 3236 a father who battered his three-year-old daughter in one district may be tried in a second district where she died of pneumonia as a consequence of his negligence there.[91]

Crimes with Individual Venue Statutes

Occasionally, Congress has enacted special venue provisions for particular crimes. These provisions dictate venue decisions unless they contravene constitutional requirements. The list includes the following:

- 8 U.S.C. § 1328 (importation of aliens for immoral purposes);[92]
- 8 U.S.C. § 1329 (immigration offenses generally);[93]

---

[84] *Hayes*, 296 F.2d at 667; *Davis*, 32 F.2d at 860.

[85] *Parker*, 103 F.2d at 861.

[86] *Taylor*, 316 F. Supp. 2d at 728.

[87] "In all cases of murder or manslaughter, the offense shall be deemed to have been committed at the place where the injury was inflicted, or the poison administered or other means employed which caused the death, without regard to the place where the death occurs," 18 U.S.C. § 3236.

[88] Ball v. United States, 140 U.S. 118, 136 (1891) ("If this section [relating venue over offenses occurring in more than one district] is applicable to the crime of murder, it certainly could not apply if the stroke were given in one district and the death ensued in some other country than the United States."). In *Ball*, the Court also noted that at common law, jurisdiction over the offense of murder required that the assault and resulting death occur within the same jurisdiction, 140 U.S. at 133.

[89] United States v. Aiken, 76 F.Supp.2d 1346, 1349-351 (S.D. Fla. 1999); United States v. Perez, 940 F.Supp. 540, 548-49 (S.D.N.Y. 1996).

[90] United States v. Gotti, 660 F.Supp.2d 512, 517 (S.D.N.Y. 2009).

[91] United States v. Eder, 836 F.2d 1145, 1148 (8th Cir. 1988). Eder is reminiscent of the cases that cite § 3236 for the proposition that a violation of 18 U.S.C. § 1111, murder within the special maritime and territorial jurisdiction of the United States, occurs when a victim is assaulted outside the territorial jurisdiction of the United States and then brought by the defendant within U.S. territorial jurisdiction and abandoned to the elements there under conditions that lead to the victim's death, United States v. Todd, 657 F.2d 212, 215 (8th Cir. 1981); United States v. Parker, 622 F.2d 298, 300 (8th Cir. 1980).

[92] "... The trial and punishment of offenses under this section may be in any district to or into which such alien is brought in pursuance of importation by the persons or persons accused, or in any district in which a violation of any of the provisions of this section occurs ..." 8 U.S.C. § 1328.

[93] "... [S]uch prosecutions ... may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under section 1325 or 1326 of this title may be apprehended ..." 8 U.S.C. § 1329. *See e.g.*, Unites States v. Uribe-Rios, 558 F.3d 347, 357 (4th Cir. 2009) (citing United States v. Herrera-Ordones, 190 F.3d 504, 511 (7th Cir. 1999)) ("Courts have interpreted this provisions [(8 U.S.C. § 1329)] as placing venue for a section 1326 offense in any district where an alien is 'found,'" whether his presence is voluntary or the authorities have

- 15 U.S.C. § 80a-43 (investment company offenses);[94]
- 15 U.S.C. § 298 (falsely stamped gold or silver);[95]
- 18 U.S.C. § 228(e) (failure to pay legal child support obligations);[96]
- 18 U.S.C. § 1073 (flight to avoid prosecution);[97]
- 18 U.S.C. § 1074 (flight to avoid prosecution for property damage);[98]
- 18 U.S.C. § 1512(*i*) (obstruction of justice);[99]
- 18 U.S.C. § 1956(*i*) (money laundering);[100]
- 18 U.S.C. § 2339(b) (harboring terrorists);[101]
- 18 U.S.C. § 2339A(a) (material support of terrorists);[102]

---

brought him there.).

[94] "... Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. A criminal proceeding based upon a violation of section 80a-33 of this title [destruction and falsification of records], or upon a failure to file a report other document required to be filed under this subchapter, may be brought in the district wherein the defendant is an inhabitant or maintains his principal office or place of business," 15 U.S.C. § 80a-43.

[95] "... [T]he district in which such violation was committed or through which has been conducted the transportation of the article in respect to which such violations has been committed ..." 15 U.S.C. § 298.

[96] "With respect to an offense under this section, an action may be inquired of and prosecuted in a district court of the United States for– (1) the district in which the child who is the subject of the support obligation involved resided during a period during which a person described in subsection (a) (referred to in this subsection as an 'obliger') failed to meet that support obligation; (2) the district in which the obliger resided during a period described in paragraph (1); or (3) any other district with jurisdiction otherwise provided for by law," 18 U.S.C. § 228(e).

[97] "... Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed, or in which the person was held in custody or confinement, or in which an avoidance of service of process or a contempt referred to in clause (3) of the first paragraph of this section is alleged to have been committed, and only upon formal approval in writing by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated," 18 U.S.C. § 1073.

[98] "Violations of this section may be prosecuted in the Federal judicial district in which the original crime was alleged to have been committed or in which the person was held in custody or confinement: Provided, however, That this section shall not be construed as indicating an intent on the part of Congress to prevent any State, Territory, Commonwealth, or possession of the United States of any jurisdiction over any offense over which they would have jurisdiction in the absence of such section," 18 U.S.C. § 1074(b).

[99] "A prosecution under this section [witness tampering] or section 1503 [obstruction of judicial proceedings] may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred," 18 U.S.C. § 1512(*i*).

[100] "(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in—(A) any district in which the financial or monetary transaction is conducted; or (B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted. (2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place. (3) For purposes of this section, a transfer of funds from one place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place," 18 U.S.C. § 1956(*i*).

[101] "A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law," 18 U.S.C. § 2339(b).

[102] " ... A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed or in any other Federal judicial district as provided by law," 18 U.S.C. § 2339A(a).

- 21 U.S.C. § 959(d) (manufacturing or distributing controlled substances abroad for importation into the United States);[103]
- 46 U.S.C. § 70504(b) (Maritime Drug Law Enforcement offenses).[104]

Special venue provisions governing prosecution of a few other crimes simply replicate the features of Rule 18, *i.e.*, a violation is to be prosecuted in the district in which it occurs:

- 15 U.S.C. § 78aa (securities offenses);
- 15 U.S.C. § 80b-14 (investment adviser offenses);
- 15 U.S.C. § 715i(c) (interstate transportation of petroleum products);
- 15 U.S.C. § 717u (natural gas offenses);
- 21 U.S.C. § 17 (falsely labeled dairy or food products).

Venue for Crimes Committed Outside Any District

The Constitution recognizes that certain crimes, like piracy, may be committed beyond the geographical confines of any federal judicial district. Article III, after declaring that the trial of crimes shall be in the state in which they are committed, adds, "but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."[105] The First Congress decided that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought."[106] The approach changed little over the years until the early 1960s.[107] Then, Congress amended the provision to address two problems: (1) to permit a single trial for crimes committed overseas by a group of offenders who scattered when they returned to this country, and (2) to toll the statute of limitations by permitting indictment when the suspect was overseas but not clearly a fugitive.[108] Section 3238 now reads as follows:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender,

[103] "This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States. Any person who violates this section shall be tried in the United States district court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia." 21 U.S.C. § 959(d). The term "enters the United States" means enters a judicial district within the United States. United States v. Rojas, 812 F.3d 382, 394-95 (5th Cir. 2016) (citing United States v. Ahumedo-Avendano, 872 F.2d 367, 371-72 (11th Cir. 1989)) (rejecting defendant's argument that venue was only proper in the District of Columbia since the plane bringing them to the United States re-fueled at Guantanamo Bay which is outside any federal district).

[104] "A person violating section 70503 or 70508 of this title shall be tried in the district court of the United States for - (1) the district at which the person enters the United States; or (2) the District of Columbia." 46 U.S.C. § 70504(b). *Ahumedo-Avendano*, 872 F.2d at 371-72 (holding that as used in the language of the statute "enters the United States" means enters "that geographic area encompassed within a judicial district.").

[105] U.S. CONST. art. III, § 2, cl. 3.

[106] 1 STAT. 114 (1790).

[107] *See* REV. STAT. §729 (1878) ("The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he may first be brought"); 18 U.S.C. § 3238 (1956 ed.) ("The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he may first be brought.").

[108] S. REP. NO. 88-146 (1963); *see generally* 2 CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE §304 (4th ed. 2009 & Supp. 2018).

> or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.[109]

The federal appellate courts disagree over whether Section 3238 may apply when an offense is committed in part within the United States and in part outside the United States. The Ninth Circuit and perhaps the Second Circuit believe that Section 3238 only applies to offenses that, as the caption says, are "not committed in any district."[110] The Third, Fourth, and Fifth Circuits believe that it need not be restricted to offenses committed wholly outside the United States, and applies to offenses that, as the section says, are "begun or committed ... elsewhere."[111]

The district to which Section 3238 refers includes the districts of the U.S. district courts in the territories, but does not include the geographical confines of the other courts of the U.S. territories that have not been designated "district courts."[112] The district in which a defendant is first arrested for purposes of Section 3228 is the district "where the defendant is first restrained of his liberty *in connection with the offense charged*."[113] Thus, venue in a particular district by operation of Section 3238 is no less proper because the defendant was initially arrested in another district under another charge,[114] or because he entered the United States in another district prior to his indictment in the District of Columbia and subsequent arrest.[115] Conversely, venue is not proper in a second district after an accused has been arrested for the extraterritorial offense in another district.[116] The "last known address" or District of Columbia basis for venue under Section 3238 is an alternative basis for venue over an extraterritorial offense only available to the exclusion of venue elsewhere when the offender has not first been arrested in or brought to another district.[117] In the case of multiple co-defendants, venue over an extraterritorial offense is proper for all offenders in any district in which it is proper for one of them.[118] Venue is no less proper because the authorities arranged for the arrest of a co-defendant within a particular district.[119]

---

[109] 18 U.S.C. § 3238.

[110] United States v. Pace, 314 F.3d 344, 351 (9th Cir. 2002); United States v. Gilboe, 684 F.2d 235, 239 (2d Cir. 1982); *but see* United States v. Miller, 808 F.3d 607, 619, 620, 621 (2d Cir. 2015) ("We thus agree with the *Pendleton* court that the word 'committed' in § 3238 encompasses crimes like Lisa's, that begin inside the United States but that are in their essence committed abroad' … Further, we do not think that venue becomes improper under § 3238 simply because it might also have been properly laid elsewhere pursuant to § 3237(a) … [O]ur dicta in *Gilboe* do not control our decision here.").

[111] United States v. Pendleton, 658 F.3d 299, 304-305 (3d Cir. 2011); United States v. Levy Auto Parts, 787 F.2d 946, 950-52 (4th Cir. 1986); United States v. Erwin, 602 F.2d 1183, 1185 (5th Cir. 1979); United States v. Rivera-Niebia, 37 F. Supp. 3d 374, 380-81 (D.D.C. 2014).

[112] United States v. Lee, 472 F.3d 638, 644-45 (9th Cir. 2006).

[113] United States v. Wharton, 320 F.3d 526, 536-37 (5th Cir. 2003) (emphasis in the original) (quoting United States v. Erdos, 474 F.2d 157, 160 (4th Cir. 1973)); *see also* United States v. Slatten, 865 F.3d 767, 786 (D.C. Cir. 2017); United States v. Feng, 277 F.3d 1151, 1155 (9th Cir. 2002); United States v. Catino, 735 F.2d 718, 724 (2d Cir. 1984).

[114] *Wharton*, 320 F.3d at 536-37.

[115] United States v. Gurr, 471 F.3d 144, 155 (D.C. Cir. 2006).

[116] United States v. Liang, 224 F.3d 1057, 1060-62 (9th Cir. 2000).

[117] Feng, 277 F.3d at 1155; United States v. Fraser, 709 F.2d 1556, 1558 (6th Cir. 1983); United States v. Hsin-Yung, 97 F. Supp. 2d 24, 28 (D.D.C. 2000).

[118] United States v. Pearson, 791 F.2d 867, 869-70 (11th Cir. 1986) (venue over offenders first brought into the Southern District of Florida was proper in the Southern District of Alabama into which a joint offender had been first brought).

[119] Slatten, 865 F.3d at 786-87. The Second Circuit has "recognized the possibility that, under certain circumstances,

There is another, alternative venue statute for certain espionage related cases, Section 3239:

> The trial for any offense involving a violation, begun or committed upon the high seas or elsewhere out of the jurisdiction of any particular State or district, of—
>
> (1) section 793, 794, 798, [espionage] or section 1030(a)(1) [obtaining classified information by unauthorized computer access] of this title;
>
> (2) section 601 of the National Security Act of 1947 (50 U.S.C. 421)[disclosure of the identities of covert agents]; or
>
> (3) section 4(b) or 4(c) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b) or (c))[receipt of classified information by foreign agents];
>
> may be in the District of Columbia or in any other district authorized by law.[120]

Section 3239 affords the government the option to bring an exterritorial espionage case in the District of Columbia when it would otherwise be precluded from doing so under Section 3238. Section 3238 permits the government to bring an extraterritorial espionage case in the District of Columbia *if* the offender's residence is unknown. If the offender's last address in this country is known, Section 3238 requires that the case be brought there or in the district in which the offender is first arrested or brought or any other district in which venue is otherwise proper. But without more the option to bring an extraterritorial espionage case in the District of Columbia is not necessarily available in all cases under Section 3238. Section 3239 changes that.

Section 3239's limited history suggests proponents may have initially had something else in mind. It was enacted as Section 320909 of the Violent Crime Control and Law Enforcement Act of 1994.[121] The committee reports accompanying that legislation barely mention it;[122] the conference report acknowledges that it comes from the Senate bill but says no more;[123] there are no Senate reports. The Senate Select Committee on Intelligence, however, had reported out a bill with identical language, the Counterintelligence and Security Enhancements Act of 1994 (S. 2056). The committee's report indicates that the section was thought to provide a more explicit

venue manipulation might be improper." United States v. Ritigliano, 790 F.3d 389, 398-99 (2d Cir. 2015). At least three other circuits have rejected the suggestion. United States v. Valenzuela, 849 F.3d 477, 488 (1st Cir. 2017); United States v. Rodriguez-Rodriguez, 453 F.3d 458, 492 (7th Cir. 2006); United States v. Al-Talib, 55 F.3d 923, 929 (4th Cir. 1995). Three others have declined to address the question. United States v. Sitzmann, 893 F.3d 811, 823 (D.C. Cir. 2018); United States v. Chi Tong Kuok, 671 F.3d 931, 938 (9th Cir. 2012); United States v. Dabbs, 134 F.3d 1071, 1079 n.10 (11th Cir. 1998).

[120] 18 U.S.C. § 3239.

[121] 108 STAT. 2127 (1994).

[122] H.R. REP. NO. 103-324; H.R. REP. NO. 103-489 (1994).

[123] H.R. REP. NO. 103-711, at 408 ("Section 320909—House recedes to Senate section 2961, optional venue for espionage").

statement of extraterritorial jurisdiction rather than an expansion of venue options.[124] This may explain why there are no reported cases under Section 3239.[125]

Venue Transfers

For Prejudice

While the Constitution promises the accused a trial in the district in which the offense was committed, it also promises him a trial by an impartial jury.[126] To fulfill this second promise, Rule 21(a) of the Federal Rules of Criminal Procedure entitles the accused to a change of venue for trial in another district when "so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there."[127]

Pre-trial publicity usually supplies the basis for a change of venue request under Rule 21(a).[128] The applicable standard is a demanding one. A transfer will ordinarily only be granted when no less disruptive curative measures will suffice. To create so great a prejudice that an impartial trial is not possible, media coverage must have been pervasive, inflammatory, contemporaneous to trial, and produced a serious contamination of the jury pool.[129] Courts have rejected transfer

---

[124] S. REP. NO. 103-296, at 27 (1994) ("Section 6 would give the U.S. District Court for the District of Columbia and other federal district court authorized by law jurisdiction over trials of offenses involving violations of U.S. espionage statutes and related statutes where the alleged misconduct took place outside the United States. According to Justice Department representatives, the lack of such jurisdiction in U.S. courts has posed, from time to time, a substantial problem in terms of trying U.S. citizens in U.S. courts even [though] their conduct allegedly violated U.S. law, e.g., passing classified U.S. information to a foreign agent. This has led to prosecutions in foreign courts even though the United States had the predominant interest in prosecution. Section 6 is intended to provide an alternative in such circumstances"). This suggests the alternative sought was trial in U.S. courts rather than trial in foreign courts; not trial in the District of Columbia rather than in some other U.S. judicial district. Venue is not mentioned; jurisdiction is.

[125] An earlier version of Section 3239, which limited venue in certain threat cases for the benefit of defendants, 18 U.S.C. § 3239 (1982 ed.), was repealed in 1984, PUB. L. NO. 98-473, §1204(b), 98 STAT. 2152 (1984).

[126] U.S. CONST. amend. VI; Skilling v. United States, 561 U.S. 358, 377 (2010).

[127] FED. R. CRIM. P. 21(a); United States v. Casellas-Toro, 807 F.3d 380, 385 (1st Cir. 2015); United States v. Rodriguez, 581 F.3d 775, 785 (8th Cir. 2009) ("A motion to change venue must be granted if pretrial publicity was so extensive that reviewing court is required to presume unfairness of constitutional magnitude"); *see generally*, Scott Kafker, *The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 U. CHI. L. REV. 729 (1985).

[128] Requests have also been made on the basis of the demographic composition of the district, but the standard here seems even more demanding than that used in the press cases, *e.g.*, United States v. Granillo, 288 F.3d 1071, 1075 (8th Cir. 2002) ("Notwithstanding defendant's evidence suggesting that Hispanics comprise a small portion of the population in the State of Iowa, defendant did not present evidence indicating that his ethnic background would prevent jurors from being fair and impartial or that Hispanics were otherwise the target of purposeful discrimination in the jury selection process within the Southern District of Iowa.").

[129] *Casellas-Toro*, 807 F.3d at 386 (internal citations omitted) ("A presumption of prejudice is generally reserved for those extreme cases where publicity is both extensive and sensational in nature. Prejudice is presumed when a degree of inflammatory publicity had so saturated the community such as to make it virtually impossible to obtain an impartial jury."); *see also Skilling*, 561 U.S. at 379, 385 (2010) ("We begin our discussion by addressing the presumption of prejudice.... Persuaded that no presumption arose, we ... next consider whether actual prejudice infected Skilling's jury. *Voir dire*, Skilling asserts did not adequately detect and defuse jury bias.... We disagree with Skilling's characterization of the *voir dire* and the jurors selected through it."). United States v. Higgs, 353 F.3d 281, 307-308 (4th Cir. 2003) ("The determination of whether a change of venue is required as a result of pretrial publicity involves a two-step process. First, the district court must determine whether the publicity is so inherently prejudicial that trial proceedings must be presumed to be stained, and , if so, grant a change of venue prior to jury selection. However, only in extreme circumstances may prejudice to a defendant's right to a fair trial be presumed from the existence of pretrial publicity itself. Ordinarily the trial court must conduct a *voir dire* of prospective jurors to determine if actual prejudice exists.").

requests under Rule 21(a) in the face of one or more factors suggesting a fair trial was possible or had been conducted: for example, when the pool of potential jurors was large and diverse;[130] when the coverage was less than pervasive;[131] when the coverage had subsided between the commission or discovery of the crime or arrest of the accused and the time of trial;[132] when the coverage was not overwhelmingly inflammatory or sensational;[133] when prospective jurors were subject to thorough voir dire, particularly if the defendant raised no objections at the time;[134] or when evidence suggested that an untainted jury nevertheless might be or might have been selected.[135] In a compelling case, the court may order trial to be held elsewhere within the district under Rule 18, which allows the trial court to set the place of trial,[136] and in a rare case may grant a change of venue.[137]

See generally, Christina Collins, *Stuck in the 1960s: Supreme Court Misses an Opportunity in* Skilling v. United States *to Bring Venue Jurisprudence into the Twenty-First Century*, 44 TEX. TECH L. REV. 391 (2012).

[130] *Skilling*, 561 U.S. at 382 ("At the time of Skilling's trial, more than 4.5 million individuals eligible for jury duty resided in the Houston area. Given this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain."); *In re* Tsarnaev, 780 F.3d 14, 21 (1st Cir. 2015) ("Boston, like Houston in Skilling, is a large, diverse metropolitan area. Boston-area residents obtain their news from a vast array of sources."); United States v. Bills, 93 F. Supp. 3d 899, 903 (N.D. Ill. 2015) ("Because the Eastern Division of this District is extremely vast, diverse, and bustling, any potential for prejudice emanating from pretrial publicity is thoroughly mitigated.").

[131] *Campa*, 459 F.3d 1121, 1144-145 (11th Cir. 2006); United States v. Jamieson, 427 F.3d 394, 413 (6th Cir. 2005); United States v. Sherwood, 98 F.3d 402, 410 (9th Cir. 1996); United States v. Brandon, 17 F.3d 409, 441 (1st Cir. 1994).

[132] *Skilling*, 561 U.S. at 383 (internal citation omitted) ("[U]nlike cases in which trial swiftly followed a widely reported crime, over four years elapsed between Enron's bankruptcy and Skilling's trial."); *In re Tsarnaev*, 780 F.3d at 22 ("The nearly two years that have passed since the Marathon bombings has allowed the decibel level of publicity about the crimes themselves to drop and community passions to diminish."); United States v. Philpot, 733 F.3d 734, 741 (7th Cir. 2013); United States v. Nelson, 347 F.3d 701, 709 (8th Cir. 2003); United States v. Yousef, 327 F.3d 56, 155 (2d Cir. 2003).

[133] *Skilling*, 561 U.S. at 382 ("[A]lthough news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or views could not reasonably be expected to shut form sight."); *Philpot*, 733 F.3d at 741; *Jamieson*, 427 F.3d at 413; *Higgs*, 353 F.3d at 308; United States v. Blom, 242 F.3d 799, 804 (8th Cir. 2001); *Brandon*, 17 F.3d at 441.

[134] United States v. Quiles-Olivo, 684 F.3d 177, 183 (1st Cir. 2012); United States v. Sabhnani, 599 F.3d 215, 234 (2d Cir. 2010).

[135] *Skilling*, 561 U.S. at 383 ("Skilling's jury acquitted him of nine insider-trading counts. Similarly, earlier instituted Enron-related prosecutions yielded no overwhelming victory for the Government. In *Rideau*, *Estes*, and *Sheppard*, in marked contrast, the jury's verdicts did not undermine in any what the supposition of juror bias. It would be odd for an appellate court to resume prejudice in a case in which juror's actions ran counter to that presumption."); *Nelson*, 347 F.3d at 709 (jury pool survey indicated "only 29% of those jurors had formed strong or fixed opinions about the case"); *Blom*, 242 F.3d at 804 (jury pool drawn from the entire state, questionnaires to probe impartiality sent to prospective jurors, increase in the number of peremptory strikes).

[136] United States v. Knox, 363 F.Supp.2d 845, 847 (W.D. Va. 2005) (scheduling retrial in another division following media attention surrounding the racketeering trial that ended in a hung jury); United States v. Dakota, 197 F.3d 821, 826-27 (6th Cir. 1999) (finding no abuse of discretion when the district court scheduled trial in different city within the same district in a case involving an anonymous jury empaneled "to minimize the prejudicial effects of pretrial publicity and an emotional, political atmosphere"); *but see* United States v. Lentz, 352 F.Supp.2d 718, 721-23 (E.D. Va. 2005) (denying motion for retrial in another division until after voir dire established it was necessary since nature and level of media coverage was not so inherently prejudicial that taint had to be assumed).

[137] United States v. Casellas-Toro, 807 F.3d 380, 386-87 (1st Cir. 2015) ("compact, insular community that is highly susceptible to the impact of local press;" "massive" and "sensation" media coverage which publicized "blatantly prejudicial information of the type readers or viewers could not reasonable be expect to shut from sight;" and voir occurring two months after televised sentencing of the defendant in a separate murder trial); United States v. McVeigh, 918 F.Supp. 1467, 1475 (W.D. Okla. 1996) (Oklahoma City bombing case).

In some instances, a superseding indictment from the original district may follow the defendant to the district to which his case has been transferred.[138]

For Convenience

Under Rule 21(b) of the Federal Rules of Criminal Procedure, "Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and witnesses and in the interest of justice." When weighing a motion for a transfer under Rule 21(b), the lower federal courts frequently point to the 10 factors mentioned in the Supreme Court's 1994 decision, *Platt v. Minnesota Mining & Manufacturing Co.*:[139]

1. location of [the] defendant;
2. location of possible witnesses;
3. location of events likely to be in issue;
4. location of documents and records likely to be involved;
5. disruption of defendant's business unless the case is transferred;
6. expense to the parties;
7. location of counsel;
8. relative accessibility of place of trial;
9. docket condition of each district or division involved; and
10. any other special elements which might affect the transfer.[140]

The motion runs to the discretion of the trial court, and an appellate court will only overturn the trial court's decision for an abuse of discretion,[141] such as a failure to apply the proper standard.[142] The defendant bears the burden of establishing that convenience and the interests of justice

---

[138] United States v. Cessa, 856 F.3d 370, 374 (5th Cir. 2017); United States v. York, 428 F.3d 1325, 1331 (11th Cir. 2005).

[139] 376 U.S. 240, 243-44 (1964).

[140] United States v. Kirk Tang Yuk, 885 F.3d 57, 74 n.5 (2d Cir. 2018); United States v. Quiles-Olivo, 684 F.3d 177, 184-85 (1st Cir. 2012); *In re* United States, 273 F.3d 380, 387-88 (3d Cir. 2001); United States v. Morrison, 946 F.2d 484, 489n.1 (7th Cir. 1991); United States v. Maruyasu Industries Co., Ltd., 229 F. Supp. 3d 659, 666 (S.D. Ohio 2017); United States v. Bowdoin, 770 F. Supp. 2d 133, 137-38 (D.D.C. 2011); United States v. Balsiger, 644 F. Supp. 2d 1101, 1121 (E.D. Wis. 2009); United States v. Burke, 607 F. Supp. 2d 1314, 1323 (M.D. Fla. 2009); United States v. Radley, 558 F. Supp. 2d 865, 877 (N.D. Ill. 2008).

[141] *Kirk Tang Yuk*, 885 F.3d at 74 n.5; United States v. Walker, 665 F.3d 212, 222-23 (1st Cir. 2011); United States v. Jordan, 223 F.3d 676, 685 (7th Cir. 2000); United States v. Perry, 152 F.3d 900, 904 (8th Cir. 1998); United States v. Maldonado-Rivera, 922 F.2d 934, 966 (2d Cir. 1990); United States v. Fagan, 821 F.2d 1002, 1008 (5th Cir. 1987).

[142] *Walker*, 665 F.3d at 222-23 (1st Cir. 2011) (internal citations and quotation marks omitted) ("An abuse of discretion occurs when a relevant factor deserving of significant weight is overlooked, or when an improper factor is accorded significant weight, or when the court considers the appropriate mix of factors, but commits a palpable error of judgment in calibrating the decision scales. Within this rubric a material error of law is invariably an abuse of discretion."); *In re United States*, 273 F.3d at 389 (record was unclear whether the trial court had required the accused to bear the burden of proof on the Rule 21(b) motion); *In re* Balsimo, 68 F.3d 185, 187 (7th Cir. 1995) (trial court erroneously applied a presumption against transfers to a contiguous district except on a showing of truly compelling circumstances); United States v. McManus, 535 F.2d 460, 464 (8th Cir. 1976) (finding an abuse of discretion in granting a change of venue to the California district of residence of the defendants because, "in view of the recent decisions of the Supreme Court that obscenity vel non must be determined on a local community standard, we have no choice but to order that this case be tried in Iowa ... A stronger showing than made here, such as intentional overreaching by the government, must be made, however, to overcome the government's choice of forum in postal obscenity cases.").

compel a transfer.[143] Courts often begin with the observation that, basic venue requirements having been satisfied, trial should be held in the original district, *i.e.*, where the government elected to bring the case.[144] Even if the prospective inconvenience for witnesses and prosecutors does not trump a defendant's transfer request, the interests of the court may.[145]

For Plea and Sentencing

A defendant, charged with an indictable offense in another district who wishes to plead guilty, may petition the court in the charging district for a transfer of venue to the district in which he is located.[146] By definition, the rule requires the pendency of an indictment, information, or complaint in the district from which the accused seeks the transfer of venue.[147] Prosecutors in both districts must concur.[148] Should the defendant subsequently fail to plead as agreed or should

[143] *In re United States*, 273 F.3d at 388; *Maruyasu Industries Co., Ltd*., 229 F. Supp. 3d at 666; United States v. Ackerman, 140 F. Supp. 3d 113, 119 (D. Mass. 2015); *United States v. Riley*, 296 F.R.D. 272, 275 (S.D.N.Y. 2014); United States v. Menendez, 109 F. Supp. 3d 720, 725 (D.N.J. 2015); United States v. Crutchfield, 379 F. Supp. 2d 913, 923 (W.D. Tenn. 2005); United States v. Stickle, 355 F. Supp. 2d 1317, 1321 (S.D. Fla. 2004), aff'd, 454 F.3d 1265 (11th Cir. 2006).

[144] United States v. Estrada, 880 F. Supp. 2d 478, 481 (S.D.N.Y. 2012) (quoting `United States v. Posner, 549 F.Supp. 475, 477 (S.D.N.Y. 1982) ("As a general rule a criminal prosecution should be retained in the original district. To warrant a transfer from the district where an indictment was properly returned it should appear that a trial there would be so unduly burdensome that fairness requires the transfer to another district of proper venue where a trial would be less burdensome."); *Bowdoin*, 770 F. Supp. 2d at 138; United States v. Motz, 652 F. Supp. 2d 284, 291 (E.D.N.Y. 2009); United States v. Wecker, 620 F.Supp. 1002, 1004 (D. Del. 1985); *Stickle*, 355 F. Supp. 2d at 1321 ("The burden falls on the defendant to demonstrate a substantial imbalance of inconvenience to himself if he is to succeed in nullifying the prosecutor's choice of venue.").

[145] United States v. Blechman, 782 F.Supp.2d 1238, 1258 (D. Kan. 2011) ("The government makes no effort to dispute that most of the factors related to the convenience of the defendants and the location of the evidence favor a transfer to the Central District of California. The case law on contempt, however, indicates there is a special element that tips the balance against a transfer for the convenience of the parties and witnesses. Venue on a contempt proceeding is fundamentally connected to the court issuing the order that is being charged as violated.") (citing United States v. Lawrence, 54 F.3d 777 (6th Cir. 1995) and Waffenschmidt v. Mackay, 763 F.2d 711 (5th Cir. 1985)).

[146] "A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if: (1) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and (2) the United States attorneys in both districts approve the transfer in writing." FED. R. CRIM. P. 20(a).

[147] *Id*.

[148] "A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if: ... (2) the United States attorneys in both districts approve the transfer in writing," *Id*.; United States v. Lovell, 81 F.3d 58, 60-1 (7th Cir. 1996); United States v. French, 787 F.2d 1381, 1384-385 (9th Cir. 1986); United States v. Herbst, 565 F.2d 638, 643 (10th Cir. 1977).

the receiving court refuse to accept the plea, the transfer is revoked.[149] Juveniles who wish to waive federal delinquency proceedings enjoy similar benefits.[150]

Addendum

The Merger of Venue and Vicinage

The merger of venue and vicinage is something of an American phenomenon. Of the two concepts we now think of as venue—where a trial must be held and where the jury must come from—the common law more often considered the first venue and the second vicinage. The theory that the jury in a criminal trial ought to come from the neighborhood in which the crime was committed pre-dates and is acknowledged in the Magna Carta, which declared that "no freeman shall be taken or imprisoned ... unless by the lawful judgment of his peers" and that punishment would not be "assessed but by the oath of honest men *in the neighborhood*."[151] Of course, the jury of Runnymede was a far cry from the jury of today. Then and for some time thereafter, it was the body whose verdict rested upon the knowledge of its members—their prior knowledge of the circumstances of the offense, of the character of the defendant, and of the credibility of the witnesses.[152] By the beginning of the colonial period, however, the English jury had been transformed into an institution more familiar to us, an impartial panel rather than one necessarily convened with prior knowledge and thus perhaps with bias. By then, a jury panel could no longer be challenged simply because none of its members came from the neighborhood where the offense had occurred; it was enough that the panel was drawn from the county where the offense had occurred.[153]

---

[149] "If the defendant pleads not guilty after the case has been transferred under Rule 20(a), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The defendant's statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant." FED. R. CRIM. P. 20(c); United States v. Khan, 822 F.2d 451, 455 (4th Cir. 1987) (following transfer under the rule, a district court has no authority to sua sponte withdraw the defendant's guilty plea, substitute a plea of nolo contendere, and acquit the defendant); In re Arvedon, 523 F.2d 914, 916 (1st Cir. 1975) ("[R]ules 11 and 20 should be read in harmony with one another. The court is, of course, not obliged to accept an involuntary or improvident plea of guilty because the defendant comes before it on a rule transfer. But, since every defendant who invokes Rule 20 does so from a desire not to return to the indicting district, that desire, by itself, is an impermissible reason to reject a proffered plea of guilty under Rule 11.") *see also* United States v. Sutton, 184 F. Supp. 3d 503, 508-509 (E.D. Ky. 2016), aff'd, 862 F.3d 547 (6th Cir. 2017).

[150] "A juvenile, as defined in 18 U.S.C. § 5031, may be proceeded against as a juvenile delinquent in the district where the juvenile is arrested, held, or present if: (A) the alleged offense that occurred in the other district is not punishable by death or life imprisonment; (B) an attorney has advised the juvenile; (C) the court has informed the juvenile of the juvenile's rights − including the right to be returned to the district where the offense allegedly occurred − and the consequences of waiving those rights; (D) the juvenile, after receiving the court's information about rights, consents in writing to be proceeded against in the transferee district, and files the consent in the transferee district; (E) the United States attorneys for both districts approve the transfer in writing; and (F) the transferee court approves the transfer." FED. R. CRIM. P. 20(d)(1).

[151] MAGNA CARTA, XXXIX, XX.

[152] THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 112-24 (5th ed. 1956); II FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, HISTORY OF ENGLISH LAW, 645-56 (2d ed. 1898); 1 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND, 254-65 (1883); FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, 8 (1951).

[153] III WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 359-60 (1768) ("Also, by the policy of the ancient law, the jury was to come *de vicineto*, from the neighbourhood of the vill or place where the cause of action was laid in the declaration; and therefore some of the jury were obliged to be returned from the hundred in which such vill lay; and, if none were returned, the array might be challenged for defect of hundredors ... for, living in the

In the turbulence that led to the American Revolution, grievances over venue seemed to roil as much as those over vicinage. Unrest in Massachusetts spurred the British Parliament to enact measures under which misconduct in the colonies might be tried in England or Canada. This denied the colonial suspect the advantages of both venue and vicinage, since jurors for a trial in London or Halifax were not likely to be drawn from a county in any of the 13 colonies. The famous protest of the Virginia House of Burgesses spoke candidly of disadvantages of the change in venue—the hardships faced while awaiting trial and the difficulty of securing the attendance of witnesses. It spoke somewhat more cryptically of the disadvantages of the loss of vicinage, "not to await his Trial before a ... Jury ... from a Knowledge of whom [he] is encouraged to hope for speedy Justice."[154] Yet when the First Continental Congress later echoed the same objections it did so in terms more clearly grounded in both vicinage and venue:

> Whereas ... it has lately been resolved in Parliament, that by force of a statute made in the thirty-fifth year of the reign of king Henry the Eighth, colonists may be transported to England, and tried there upon accusations for treasons and misprisions, or concealments of treasons committed in the colonies ... Resolved, That the following acts of Parliament are infringements and violations of the rights of the colonists; and that the repeal of them is essentially necessary, in order to restore harmony between Great Britain and the American colonies ... 12 Geo.3, ch. 24 ... which declares a new offense in America, and deprives the American subject of a constitutional trial by jury of the vicinage, by authorizing the trial of any person charged with the committing [of] any offense described in the said act, out of the realm, to be indicted and tried for the same in shire or county within the realm ...[155]

On the other hand, when it came time to list colonial complaints against the British Crown in the Declaration of Independence, that document mentioned only venue:

> He [the King of Great Britain] has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their

---

neighbourhood, they were properly the very country, or *pais*, to which both parties had appealed; and were supposed to know before-hand the characters of the parties and witnesses, and therefore the better knew what credit to give to the facts alleged in evidence. But this convenience was overballanced by another very natural and almost unavoidable inconvenience; that jurors, coming out of the immediate neighbourhood, would be apt to intermix their prejudices and partialities in the trial of the right. And this our law was so sensible of, that for a long time has been gradually relinquishing this practice ... At length, by statute 4 &5 Ann. c.16, it was entirely abolished upon all civil actions, except upon penal statutes; and upon those also by the 24 Geo.II. c.18. the jury being now only to come *de corpore comitatus*, from the body of the county at large, and not *de vicineto*, or from the particular neighbourhood")); William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 60 (1944); *see generally*, Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801 (Pt.I) (1976); 30 OKLA. L. REV. 73 (Pt.II). (1977).

[154] Letter dated May 17, 1769, to His Royal Majesty, George III, from the Virginia House of Burgesses, JOURNALS OF THE HOUSE OF BURGESSES 1766-1769, 216 ("When we consider, that by the established Laws and Constitution of this Colony, the most ample Provision is made for apprehending and punishing all those who shall dare to engage in any treasonable Practices against your Majesty, or disturb the Tranquility of Government, we cannot, without Horror, thinks of the new, unusual, and permit us, with all Humility, to add, unconstitutional and illegal Mode, recommended to your Majesty, of seizing and carrying beyond Sea, the Inhabitants of America, suspected of any Crime; and of trying such Persons in any other Manner than by the ancient and long established Course of Proceeding: For, how truly deplorable must be the Case of a wretched American, who, have incurred the Displeasure of any one in Power, is dragged from his native Home, and his dearest domestick Connections, thrown into Prison, not to await his Trial before a Court, Jury, or Judges, from a Knowledge of whom is encouraged to hope for speedy Justice; but to exchange his Imprisonment in his own Country, for Fetters amongst Strangers? Conveyed to a distant Land, where no Friend, no Relation, will alleviate his Distresses, or minister to his Necessities; and where no Witness can be found to testify [to] his Innocence; shunned by the reputable and honest, and consigned to the Society and Converse of the wretched and abandoned; he can only pray that he may soon end his Misery with his life.").

[155] 1 Journal of the continental Congress 69 (Oct. 14, 1774).

> acts of pretended Legislation: ... For transporting us beyond Seas to be tried for pretended offenses …[156]

The men who drafted the Constitution apparently never seriously questioned the proposition that became Article III, §2, cl.3 ("The trial of all Crimes ... shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed"), for it was feature of each of the preliminary proposals—as language in the Pinckney Plan,[157] as well as in the Hamilton Plan,[158] and in all probability figured in the formulation of the New Jersey or Patterson Plan.[159] But vicinage was nowhere mentioned.

Some of the delegates to the various state conventions called to ratify the Constitution objected to the omission,[160] and when the First Congress convened James Madison attempted to meet the objection. He proposed an amendment to appear not as a Sixth Amendment in a Bill of Rights but in Article III of the Constitution under which criminal trials would "be by an impartial jury of freeholders of the vicinage."[161] Although the provision passed the House, the Senate would not agree, perhaps because the laws of some of the states permitted jurors to be drawn from anywhere within the state.[162] The language upon which the two houses ultimately agreed is found in the Sixth Amendment today: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."[163] Story explained the compromise as an effort to ensure that the accused would neither be unfairly inconvenienced nor be the beneficiary of too parochial a jury.[164]

---

[156] THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

[157] III MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 600 (1966) ("All Criminal offenses, (except in cases of impeachment), shall be tried in the State where they shall be committed—the trial shall be open & public & be by Jury ...").

[158] *Id.* at 626 ("All crimes, except upon impeachment, shall be tried by a Jury of twelve men; and if they shall have been committed within any State, shall be tried within such State ...").

[159] Farrand quotes the proposals of Convention delegate Roger Sherman of Connecticut which Farrand believed "more probably present[ed] the ideas of the Connecticut delegation in forming the New Jersey Plan." *Id.* at 615. Sherman proposed, *inter alia*, "That no person shall be liable to be tried for any criminal offence, committed within any of the United States, in any other state than that wherein the offence shall be committed, nor be deprived of the privilege of trial by a jury, by virtue of any law of the United States." *Id.* at 616.

[160] II JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 109-10 (Holmes-Mass.) ("It is a maxim universally admitted, that the safety of the subject consists in having a right to a trial as free and impartial as the lot of humanity will admit of. Does the Constitution make provision for such a trial? I think not; for in a criminal process, a person shall not have a right to insist on a trial in the vicinity where the fact was committed where a jury of the peers would, from their local situation, have an opportunity to form a judgment of the *character* of the person charged with the crime, and also to judge of the *credibility* of the witnesses. There a person must be tried by a jury of strangers; a jury who *may* be interested in his conviction; and where he *may* by reason of the distance of his residence from the place of trial, be incapable of making such a defence as he is, in justice, entitled to, and which he could avail himself of, if his trial was in the same county where the crime is said to have been committed"); *see also id.* at 400 (Treadway-N.Y.); III JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 545 (Henry-Va.); *id*. at 569 (Grayson-Va.); IV JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 150 (McDowall-N.C.).

[161] 1 ANNALS 436 (1789).

[162] Letter from James Madison to Edmund Pendleton, dated September 14, 1789, "The Senate have sent back the plan of amendments with some alternations which strike in my opinion at the most salutary articles. In many of the States juries even in criminal cases, are taken from the State at large—in others from districts of considerable extent—in very few from the County alone. Hence a dislike to the restraint with respect to *vicinage*, which has produced a negative on that clause." 12 THE PAPERS OF JAMES MADISON 402.

[163] 1 STAT. 98 (1789).

[164] II JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §1781 (1833) ("It is observable, that the trial of all crimes is not only to be by jury, but to be held in the State where they are committed. The object of this clause is to secure the

By the time the amendments were sent to the states for ratification, the geographical distinction between venue (state in which the crime occurs) and vicinage (district in which the crime occurs) made little difference, for Congress had established the federal courts with a single district for each state, except in Virginia and Massachusetts, where separate districts were created for portions of those states that would soon become the states of Kentucky and Maine.[165] Congress preserved a semblance of common law vicinage distinct from venue, however, when it decreed that in federal capital cases trial had to be held in the county in which the offense occurred, if possible, and jurors had to be drawn from there in any event.[166]

The county venue requirement in capital cases survives to this day,[167] but Congress repealed the distinct vicinage component that insisted that jurors be drawn from the county of the crime in 1862.[168] Thereafter, other explicit vicinage components, distinct from constitutional venue and vicinage requirements, surfaced occasionally when Congress divided districts into divisions.[169] The Judicial Code revision of 1911 eliminated the explicit statutory basis for all of these,[170] but up until 1966 divisional vicinage practices continued in some districts under the umbrella of the venue provisions of Rule 18 of the Federal Rules of Criminal Procedure.[171] When the division clause was eliminated from Rule 18 in 1966 at least one commentator concluded that for purposes of federal law the venue has consumed vicinage;[172] the questions of where have become one: In what district[s] is venue (venue/vicinage) proper?

---

party accused from being dragged to a trial in some distant State, away from his friends, and witnesses, and neighborhood, and thus to be subjected to the verdict of mere strangers, who may feel on common sympathy, or who may even cherish animosities or prejudices against him. Besides this, a trial in a distant State or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence. There is little danger, indeed, that Congress would ever exert their power in such an oppressive and unjustifiable a manner. But upon a subject so vital to the security of the citizen, it was fit to leave as little as possible to mere discretion. By the common law, trial of all crimes is required to be in the county where they are committed. Nay, it originally carried its jealousy still further, and required that the jury itself should come from the vicinage of the place where the crime was alleged to be committed. This was certain a precaution which, however, justifiable in an early and barbarous state of society, is little commendable in its more advance stages. It has been justly remarked, that in such cases to summon a jury laboring under local prejudices is laying a snare for their consciences; and though they should have virtue and vigor of mind sufficient to keep them upright, the parties will grow suspicious, and indulge other doubts of the impartiality of the trial").

[165] 1 STAT. 73 (1789).

[166] 1 STAT. 88 (1789) ("[I]n cases punishable with death, the trial shall be held in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence"). Early federal capital offenses included piracy, treason, murder, and counterfeiting, 1 STAT. 112-14 (1789).

[167] 18 U.S.C. § 3235.

[168] 12 STAT. 588 (1862).

[169] *E.g.*, 20 STAT. 102 (1878) ("All offenses committed in either of the subdivisions shall be cognizable and indictable within said division ... All grand and petit jurors summoned for service in each division shall be residents of such division."); *see also*, 21 STAT. 64 (1880), 21 STAT. 176 (1880), 25 STAT. 388 (1988), 28 STAT. 68 (1894), 31 STAT. 6 (1900).

[170] 36 STAT. 1169 (1911).

[171] FED. R. CRIM. P. 18 (1964 ed.) ("... if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed.").

[172] Drew L. Kershen, *Vicinage*, 30 OKLA. L. REV. 3, 65, 72, 74-5 (1977) ("After 1911, so far as Congress was concerned, the concept of vicinage had disappeared as an independent, significant concept ... Hence, after 1911, the federal courts, just like Congress, totally identified the geographical source from which petit jurors were summoned with the place at which the trial was being held. For the courts, too, the concept of vicinage had been subsumed within the concept of venue ... In light of the legislative and decisional history of the concepts of venue and vicinage ... it is understandable that Professor Wright could say ... that the distinction between venue and vicinage is a 'technical

Author Information

Charles Doyle
Senior Specialist in American Public Law

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

distinction having no importance.' It is also understandable that Professor Blue could write as early as 1944: 'The tendency of modern law is to think of the place of trial rather than the place from which the jury must be summoned. From vicinage to venue has been the pattern of development, and the transition is about complete.' With the deletion of the divisional venue in 1966 ... the transition was complete.") (quoting I CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 301, at 579 (Crim. 1969) and William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 91 (1944)); *see also* United States v. Wipf, 397 F.3d 677, 685-86 (8th Cir. 2005) (the Sixth Amendment does not require summoning jurors from the division of the district in which the crime occurred); United States v. Miller, 116 F.3d 641, 659 (2d Cir. 1997) ("The [Sixth] Amendment's guarantees of an impartial jury 'of the State and district' in which the crime was committed does not require a narrower geographical focus than the district itself.").

For arguments in favor of recognizing a community right to vicinage see Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658 (2000); Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533 (1992).