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Venue: A Brief Look at Federal Law Governing Where a Federal Crime May Be Tried

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Summary

The United States Constitution assures those charged with a serious federal crime that they are entitled to jury trial 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 must 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 dictate where a multi-district crime or overseas crime may be tried.

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. 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, victims, and 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.

This report is an abridged version of CRS Report RL33223, *Venue: A Legal Analysis of Where a Federal Crime May Be Tried*, by Charles Doyle, stripped of the footnotes and most of the citations to authority found in the longer version.

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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 was committed. The words Congress uses when it drafts a criminal statute will establish where the offense occurs and therefore the district or districts in which venue is proper. The test endorsed in *Rodriguez-Moreno*, is the following: Where did the activity or omission that offends the statute's "conduct element" occur?

Crimes Occurring in More Than One District

Some statutes limit venue to a particular district even though the offense could be said to have occurred in more than one district and thus otherwise might have been tried in any of the two or more districts in which it was committed. Others simply clarify the several districts in which venue for the trial of certain offenses is proper. The general statute that seeks to clarify venue in the case of multi-district crimes is 18 U.S.C. 3237. 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.

Continuing Offenses

Conspiracy: Some time ago, the Supreme Court pointed out that conspiracy could be considered something akin to a continuous offense. Conspiracy, it declared, 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, *Hyde v. United States* ("[I]f the unlawful combination and the overt act constitute the offense ... marking its beginning and its execution or a step in its execution, §731 of the Revised Statutes [18 U.S.C. 3237's predecessor] must be applied"). Even for those conspiracy offenses for which an overt act is not an element, the Court in *Hyde* implied that a prosecution might be had in any district in which an overt act in their furtherance was committed. 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 or not. It is interesting to note that in *Cabrales*, when the Court observed that the money 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. Nevertheless, later the Court in *Whitfield* mentioned in passing 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."

Venue in the Place of Impact: Continuing offenses and the first paragraph of subsection 3237(a) present one other puzzle: When is venue proper in any district in which the crime's effects are felt? 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 was committed elsewhere. 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.

After *Rodriguez-Moreno*, the courts continue to recognize an "effects" or "substantial contacts" test for venue, but generally hold that the effect must also constitute a "conduct element" under the statute defining the offense, and that venue may not be based on elements of the offense which are not conduct elements.

Mail and Commerce Cases: The second paragraph of subsection 3237(a) expands the number of districts where prosecutions for offenses involving smuggling, the mails, or commerce may be brought to any district from, through, or into which "commerce, mail matter, or [an] imported object or person moves." The paragraph was added when title 18 of the *United States Code* was revised in 1948. Interstate transportation and mail cases had previously been resolved under the continuing offense language of the first paragraph discussed above. Professor Wright suggested that the paragraph stems from a misreading of the Supreme Court's opinion in *United States v. Johnson* and that at its outer limits the paragraph may lie beyond constitutional expectations. Perhaps for this reason, although the paragraph has been used under a wide range of circumstances, its invocation has not always been successful.

Tax Cases: The tax 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. The subsection was added in 1958 upon 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. A qualified defendant's request to be tried in his home district, however, must be filed within 20 days. Requests that are not timely cannot be granted. The subsection is only available in the case of prosecutions under 26 U.S.C. 7203 (willful failure to file a return, supply information or pay a tax), 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).

Other Continuous Offenses: In *Armour Packing Co. v. United States*, 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 "[t]his is a single continuing offense … continuously committed in each district through which the transportation is received at the prohibited rate." The Court's most recent venue decision confirmed the continued vitality of this view when it held that if Congress so crafts a criminal offense as to embed within it a continuing offense as one of the conduct elements of the new crime, venue over the new crime is proper wherever trial over the continuing offense may be had. In *United States v. Rodriguez-Moreno*, it held that the constitutional right to a jury trial in the state and district in which the crime occurs did not preclude trial for use of a firearm during the commission of a predicate offense in a state and district, New Jersey, other than that in which the firearm was used, Maryland. 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." A defendant commits a crime and may be tried where *he* commits any of its *conduct* elements. 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.

In addition to kidnaping, the lower federal appellate courts have found venue proper based on the continuing nature of violations involving, *inter alia*: (a) false statements (18 U.S.C. 1001); (b) wire fraud (18 U.S.C. 1343); (c) mail fraud (18 U.S.C. 1341); (d) bank fraud (18 U.S.C. 1344); (e) possession of controlled substances with the intent to distribute (21 U.S.C. 841); (f) Hobbs Act (violent interference with interstate commerce) (18 U.S.C. 1951); (g) unlawful possession of a firearm (18 U.S.C. 922(g)); (h) Travel Act (interstate travel in aid of racketeering)(18 U.S.C. 1952); (i) violent crimes in aid of racketeering (18 U.S.C. 1959); (j) failure to pay child support (18 U.S.C. 228); (k) harobroing terrorists (18 U.S.C. 2339(b); and (l) providing material support for terrorist offenses (18 U.S.C. 2339A).

Murder Cases

Sections 3235 and 3236 of Title 18 of the *United States Code* provide special venue requirements in murder cases. Section 3235 dates from the First Congress, 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. As in other instances, the benefits of Section 3235 can be waived if the accused fails to move to dismiss for improper venue. Moreover, the determination of the benefit can be afforded "without great inconvenience" is a matter within the trial court's discretion. Great inconvenience has been found when there was no federal courthouse within the county in which the crime was committed; when a majority of the government's witnesses were located outside of the county in which the crime was committed; and when observance would overburden court resources.

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. 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. Here too the case law is sparse. Two trial courts have held that the section 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. A third held that section must yield where Section 3237 (venue in multiple districts) is applicable. And an appellate court has held that under the section 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.

Crimes with Individual Venue Provisions

Crimes with Individual Venue Statutes: In a few other instances, Congress had enacted special venue provisions for particular crimes. The provisions dictate venue decisions unless they contravene constitutional requirements. The list includes (a) 8 U.S.C. 1328 (importation of aliens for immoral purposes); (b) 8 U.S.C. 1329 (immigration offenses generally); (c) 15 U.S.C. 78aa (securities offenses); (d) 15 U.S.C. 80a-43 (investment company offenses); (e) 15 U.S.C. 298 (falsely stamped gold or silver); (f) 18 U.S.C. 228(e) (failure to pay legal child support obligations); (g) 18 U.S.C. 1073 (flight to avoid prosecution); (h) 18 U.S.C. 1074 (flight to avoid prosecution for property damage); (i) 18 U.S.C. 1512(*i*) (obstruction of justice); (j) 18 U.S.C. 1752(c) (secret service offenses); (k) 18 U.S.C. 1956(*i*) (money laundering); (l) 18 U.S.C. 2339(b) (harboring terrorists); and (m) 18 U.S.C. 2339A(a)(material support of terrorists).

Aiding and Abetting

Those who aid and abet the commission of a federal crime are punishable as principals. *Cabrales* suggests they may be prosecuted wherever the underlying offense was committed. ("Nor do they charge her as an aider or abettor in the Missouri drug trafficking.") Subsequent lower federal appellate courts have so held.

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, provides that, "but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." 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." The approach changed little over the years until the early 1960s. Then, it was amended 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. It now reads,

> 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, 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. 18 U.S.C. 3238.

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 and Second Circuits believe the section only applies to offenses that, as the caption says, are "not committed in any district." The Third, Fourth, and Fifth Circuits believe that it need not be restricted to offenses committed wholely outside the United States, and applies to offenses that, as the section says, "are begun or committed ... elsewhere."

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." The district in which a defendant is arrested or into which he is brought for purposes of Section 3238 is the district "where the defendant is first restrained of his liberty *in connection with the offense charged*." 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, or because he entered the United States in another district prior to his indictment in the District of Columbia and subsequent arrest. Conversely, venue is not proper in a second district after an accused has been arrested for the extraterritorial offense in another. The "last known address" or District of Columbia basis for venue under Section 3238 is an alternative basis for venue over an extraterritorial offense available to the exclusion of venue elsewhere when the offender has not first been arrested in or brought to another district. Of course, in the case of multiple, joint offenders, venue over an extraterritorial offense is proper for

all offenders in any district in which it is proper for one of them. Finally, the fact that venue may be proper elsewhere under other statutory provisions, does not preclude venue under Section 3238.

There is a second, alternative venue statute for certain espionage related cases:

> 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.18 U.S.C. 3239.

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. Section 3239 changes that. It affords the government the option to bring an exterritorial espionage case in the District Columbia when it would otherwise be precluded from doing so.

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, 108 Stat. 2127 (1994). The committee reports accompanying that legislation barely mention it; the conference report acknowledges that it comes from the Senate bill but says no more; 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 statement of extraterritorial jurisdiction rather than an expansion of venue options. This may explain why there are no reported cases under Section 3239.

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. 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."

Pre-trial publicity usually supplies the basis for a change of venue request under Rule 21(a). 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. Requests for transfer under Rule 21(a) have been rejected 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; when the coverage was less than pervasive; when the coverage had subsided between the commission or discovery of the crime or arrest of the accused and the time of trial; when the coverage was not overwhelmingly inflammatory or sensational; when prospective jurors were subject to thorough voir dire, particularly if the defendant raised no objections at the time; or when evidence suggested that an untainted jury nevertheless might be or might have been selected. 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, and in a rare case may grant a change of venue.

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 ten factors mentioned in *Platt v. Minnesota Mining & Manufacturing Co.*: (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.

The motion runs to the discretion of the trial court, and the trial court's decision will only be overturned for an abuse of discretion such as a failure to apply the proper standard. The defendant bears the burden of establishing that convenience and the interests of justice compel a transfer. The cases suggest it is a difficult burden to bear. Courts often begin with the observation that, basic venue requirements having been satisfied, trial should be held where the government chooses. If the interests of the government do not trump a transfer request, the interests of the court may. Occasionally, denial of transfer request will speak in terms that seem at odds with the sentiments that led to drafting of the venue provisions in Article III and the Sixth Amendment.

For Plea and Sentencing

Defendants who wish to waive their right to trial may petition the court in the district in which they have been charged for a change of venue, for sentencing purposes, to the district in which they are being held or are present. By definition, the rule requires the pendency of an indictment, information, or complaint in the district from which the accused seeks a transfer of venue. Prosecutors in both districts must concur. Should the defendant subsequently fail to plead as agreed or should the receiving court refuse to accept the plea, the transfer is revoked. Juveniles who wish to waive federal delinquency proceedings enjoy similar benefits.

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