

# CRS Report for Congress

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

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### Summary

Federal law promises criminal defendants a proper venue, i.e., trial in the district in which the federal crime was committed. A crime is committed 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. Others begin in one district and are completed in another. They may be tried where they occur unless Congress has limited the choice of venue for the particular offense. Conspiracy may be tried in any district in which an overt act in its furtherance is committed, at least when the commission of an overt act is an element of the conspiracy statute at issue. Crimes committed beyond the territorial confines of the United States are usually tried in the district into which the accused is first brought. The court may grant a change of venue at the behest of the defendant to avoid undue prejudice, for the convenience of the parties, or for sentencing purposes. 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. It will be revised as circumstances warrant.

Related reports include CRS Report RS22360, *Venue for Federal Criminal Prosecution: Proposals in the 109<sup>th</sup> Congress*, by Charles Doyle.

**Threshold Issues.** Before a court decides whether venue in a particular district is proper, it would confront the question of who bears the burden of persuasion on the issue, to what level of persuasion, and whether waiver by the accused obviates the need for further inquiry. It is generally agreed that the government bears the burden of establishing that venue is proper, i.e., that the offense is being prosecuted in the district in which it was committed. This obligation extends to every count within the indictment or information; there is no supplemental venue. Venue, however, is not a substantive element of the offense and consequently the government need only establish venue by a preponderance of the evidence. Moreover, venue is not jurisdictional. Therefore, a court in an improper venue enjoys the judicial authority to proceed to conviction or acquittal,

if the accused waives objection. If the absence of proper venue is apparent on the face of indictment or information, failure to object prior to trial constitutes waiver. 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.

**In What District Did the Crime Occur.** 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.” Which is to say, the inquiry begins by identifying (1) the statutory prohibition charged, (2) what acts or omissions of the accused are alleged to have been committed in violation of the prohibition, and (3) where those acts or omissions occurred. 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. The test endorsed by the Supreme Court is – where did the activity or omission that satisfies the statute's “conduct element” occur?

**Multi-District Crimes.** There is a general statute that seeks to clarify venue in the case of multi-district crimes, 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.

**Crimes Continuing Through More than One District.** The first paragraph of section 3237 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 one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.” Although money laundering is sometimes a continuing offense, the Supreme Court has observed recently that money laundering and the crimes that generated the tainted funds do not *automatically* form one continuous criminal episode so as to permit trial of the laundering offense in the foreign district in which money-generating offense occurred, *United States v. Cabrales*.

**Conspiracy.** Conspiracy may be the most commonly recognized “continuing offense,” although whether conspiracy is really a continuing offense or merely shares the attributes of a continuing offense is not clear. 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*, 225 U.S. 347, 360-61 (1912). 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. Nevertheless it is interesting to note that when *Cabrales* 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.

*Aiding and Abetting.* Those who aid and abet the commission of a federal crime are punishable as principals, 18 U.S.C. 2. *Cabrales* suggests they may be prosecuted wherever the underlying offense was committed. Subsequent lower federal appellate courts have so held.

*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," *id.* 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); and (j) failure to pay child support (18 U.S.C. 228).

*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? The Court expressly declined to address the issue in *Rodriguez-Moreno*. The government had argued venue may also be based on the effects of a defendant's conduct in another district and cited the lower court obstruction of justice and Hobbs Act cases. The Hobbs Act outlaws the obstruction of interstate or foreign commerce through the use of violence or extortion. Venue for a Hobbs Act violation is generally considered proper in any district in which there is an obstruction of commerce. Yet obstruction is an element of the offense. The act is drafted in such a way that obstruction is arguably a conduct element; if so, it would seem to provide little support for "impact" venue in the case of those crimes for whom the effect is not a conduct element.

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 has 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 opt for trial 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. 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).

**Crimes With Individual Venue Statutes.** In a few 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. 80a-43 (investment company offenses); (d) 15 U.S.C. 298 (falsely stamped gold or silver); (e) 18 U.S.C. 228(e) (failure to pay legal child support obligations); (f) 18 U.S.C. 1073 (flight to avoid prosecution); (g) 18 U.S.C. 1074 (flight to avoid prosecution for property damage); (h) 18 U.S.C. 1512(i)(obstruction of justice); (i) 18 U.S.C. 1752(c)(secret service offenses); (j) 18 U.S.C. 1956(i) (money laundering); (k) 18 U.S.C. 2339(b) (harboring terrorists); and (l) 18 U.S.C. 2339A(a)(material support of terrorists).

**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. The application section now declares, “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.

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 extraterritorial 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. U.S.Const. Amend. VI. 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 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, or when evidence suggested that an untainted jury might nevertheless be selected. In a compelling case, the court may order trial to be 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 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 the ten factors mentioned in *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 243-44 (1964): (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. WRIGHT ON FEDERAL PRACTICE AND PROCEDURE describes the rule as one designed for the convenience of the accused. Be that as it may, a number of courts continue to observe a general rule that prosecution should be kept in the district where the government filed it. Others appear to exercise their discretion to the same effect. Still others 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. The more recently reported cases indicate that few defendants are able to carry their burden. Those who do fall into two categories – (1) cases involve extraordinary facts, or (2) cases whose results defy explanation since their facts seem indistinguishable from those in the cases where the motion was denied.

**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 waived federal delinquency proceedings enjoy similar benefits.