

January 2016

## Fundamental Since Our Country's Founding: United States v. Auernheimer and the Sixth Amendment Right to Be Tried in the District in Which the Alleged Crime was Committed

Paul Mogin

Follow this and additional works at: <https://digitalcommons.du.edu/crimlawrev>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

Paul Mogin, Fundamental Since Our Country's Founding: United States v. Auernheimer and the Sixth Amendment Right to Be Tried in the District in Which the Alleged Crime was Committed, 6 U. Denv. Crim. L. Rev. 37 (2016)

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in University of Denver Criminal Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

---

## Fundamental Since Our Country's Founding: United States v. Auernheimer and the Sixth Amendment Right to Be Tried in the District in Which the Alleged Crime was Committed

### Keywords

Criminal law, Practice and procedure, Procedure, Sixth amendment, States

**"FUNDAMENTAL SINCE OUR COUNTRY'S FOUNDING":  
*UNITED STATES V. AUERNHEIMER* AND THE SIXTH AMENDMENT  
RIGHT TO BE TRIED IN THE DISTRICT IN WHICH  
THE ALLEGED CRIME WAS COMMITTED**

*Paul Mogin\**

\* Paul Mogin is a partner at Williams & Connolly LLP in Washington, D.C and a graduate of Harvard Law School. A member of the American Law Institute and the National Association of Criminal Defense Lawyers, he argued and won *Cleveland v. United States*, 531 U.S. 12 (2000), in which the Supreme Court held that the federal mail fraud statute does not extend to an allegedly fraudulent filing seeking a state license. Mr. Mogin's practice encompasses civil and criminal litigation, with a special emphasis on white collar criminal cases, civil and criminal appeals, government investigations, and cases involving claims for punitive damages.

## INTRODUCTION

The Sixth Amendment guarantees a defendant “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.”<sup>1</sup> For most of the nation’s history, except for a “continuing offense” such as conspiracy, federal courts generally required that a federal crime be prosecuted in the single district in which it was deemed to have been committed.<sup>2</sup>

After 1970, however, as prosecutors increasingly resorted to multi-count and multi-defendant indictments,<sup>3</sup> the established approach to venue often made it difficult to bring all potential charges in the same district. During this period, some commentators began to question the traditional approach to venue. In particular, a 1983 Note in the *Michigan Law Review* argued that “the overriding consideration in venue problems should be the accessibility of witnesses and tangible evidence for investigation and use at trial,” and that “the constitutional test should not be employed rigidly, but rather in the manner necessary to facilitate factfinding.”<sup>4</sup>

Relying in part on that student Note, the Second Circuit, in its 1985 decision in *United States v. Reed*,<sup>5</sup> opined that the traditional method of determining the constitutionally permissible venue had been plagued by “an analytic flaw.”<sup>6</sup> “Both courts and commentators have tended to construe the constitutional venue requirement as fixing a single proper situs for trial,” the Second Circuit wrote, but “where the acts constituting the crime and the nature of the crime charged implicate more than one location, the constitution does not command a single exclusive venue.”<sup>7</sup> “[T]o determine constitutional venue,” courts should not seek to identify one district where an alleged offense was committed, the Second Circuit explained, but instead should apply “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

---

<sup>1</sup> U.S. CONST. amend. VI (emphasis added). Unlike the venue provision of Article III, which refers to the place of trial, the Sixth Amendment refers to the geographical unit from which the jury is to be drawn. But the Supreme Court has long interpreted the Sixth Amendment as a venue provision guaranteeing the accused the right to be tried in the state and district where the crime was committed. See *Johnston v. United States*, 351 U.S. 215, 220 (1956); *Hyde v. United States*, 225 U.S. 347, 364 (1912). As explained in *United States v. Passodelis*, 615 F.2d 975 (3d Cir. 1980),

Literally, the provision in Article III is a venue provision since it specifies the place of trial, whereas the provision in the Sixth Amendment is a vicinage provision since it specifies the place from which the jurors are to be selected. This distinction, however, has never been given any weight, perhaps because it is unlikely that jurors from one district would be asked to serve at a trial in another district, or perhaps, more importantly, because the requirement that the jury be chosen from the state and district where the crime was committed presupposes that the jury will sit where it is chosen.

*Id.* at 977 n.3.

<sup>2</sup> See *infra* notes 53-70 and accompanying text.

<sup>3</sup> See, e.g., *United States v. Ashburn*, 38 F.3d 803, 818 (5th Cir. 1994) (en banc) (Goldberg, J., dissenting) (citing “the proclivity of prosecutors to file multi-count indictments”); *United States v. Sanchez*, 790 F.2d 245, 251 (2d Cir. 1986) (citing “the current spate of multi-count indictments charging multiple defendants and requiring the commitment of literally weeks and months of trial time”); *United States v. Olson*, 504 F.2d 1222, 1225 (9th Cir. 1974) (“[T]he District Court had commendable motives in seeking to deal with the United States Attorney’s policy of presenting overly lengthy indictments.”); *United States v. Mejias*, 417 F. Supp. 579, 585 (S.D.N.Y. 1976) (referring to “this age of multi-defendant, multi-count indictments”).

<sup>4</sup> Note, *Criminal Venue in the Federal Courts: The Obstruction of Justice Puzzle*, 82 MICH. L. REV. 90, 95, 108 (1983).

<sup>5</sup> *United States v. Reed*, 773 F.2d 477, 480 (2d Cir. 1985).

<sup>6</sup> *Id.* at 480.

<sup>7</sup> *Id.*

criminal conduct, and the suitability of each district for accurate factfinding.”<sup>8</sup> The Second Circuit proceeded to overrule a decision concerning venue for obstruction of justice charges that had stood since 1951 and had been decided by three of the court’s leading jurists, Chief Judge Thomas Walter Swan and Judges Augustus and Learned Hand.<sup>9</sup>

In the three decades since *Reed*, the Second Circuit, in its own words, has “alternately applied and ignored the substantial contacts test.”<sup>10</sup> That test has had a greater impact in the Sixth Circuit, which adopted it a year after *Reed* was decided and has continued to apply it.<sup>11</sup> The Fourth and Seventh Circuits have also discussed the test with approval,<sup>12</sup> although the Fourth Circuit, citing intervening Supreme Court decisions, later questioned the decision in which it had done so.<sup>13</sup> In contrast, the Tenth Circuit has rejected the test.<sup>14</sup>

Recently, in *United States v. Auernheimer*, the government invoked *Reed* in urging the Third Circuit to uphold venue in a prosecution against a well-known Internet “troll.”<sup>15</sup> Together with a collaborator, the defendant wrote a computer program that collected more than 100,000 e-mail addresses of iPad 3G users from AT&T’s website, where they had been inadvertently left available on public servers.<sup>16</sup> To publicize what he had done, the defendant informed the media and later shared the e-mail addresses with a reporter who expressed interest in writing a story.<sup>17</sup> The reporter then wrote a story that described the security flaw, identified the names of some of the persons whose e-mail addresses had been collected, and included redacted images of a few e-mail addresses.<sup>18</sup>

The defendant’s actions occurred in Arkansas, and the servers were located in Atlanta and Dallas.<sup>19</sup> Nevertheless, the government obtained an indictment and conviction in New Jersey, the residence of a small percentage of the iPad 3G users whose e-mail addresses were collected.<sup>20</sup>

---

<sup>8</sup> *Id.* at 481 (emphasis added).

<sup>9</sup> *See id.* at 478 n.1 (overruling *United States v. Brothman*, 191 F.2d 70 (2d Cir. 1951)).

<sup>10</sup> *United States v. Coplan*, 703 F.3d 46, 80 (2d Cir. 2012). *Compare* *United States v. Saavedra*, 223 F.3d 85, 86, 92-94 (2d Cir. 2000) (applying *Reed*’s substantial contacts rule and emphasizing that “in today’s wired world of telecommunication and technology, it is often difficult to determine exactly where a crime was committed, since different elements may be widely scattered in both time and space, and those elements may not coincide with the accused’s actual presence”), with *United States v. Tzolov*, 642 F.3d 314, 319 (2d Cir. 2011) (holding, without citation to *Reed*, that venue for securities fraud charge was improper because “venue is not proper in a district in which the only acts performed by the defendant were preparatory to the offense and not part of the offense” (quoting *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1190 (2d Cir. 1989)). *See also* *United States v. Davis*, 689 F.3d 179, 186 (2d Cir. 2012) (treating *Reed* as applicable only to continuing offenses); *United States v. Royer*, 549 F.3d 886, 895 (2d Cir. 2008) (“in this Circuit, venue must not only involve some activity in the situs district but also satisfy the ‘substantial contacts’ test of *Reed*”); *United States v. Ramirez*, 420 F.3d 134, 139 (2d Cir. 2005) (same).

<sup>11</sup> *See* *United States v. Zidell*, 323 F.3d 412, 423 (6th Cir. 2003); *United States v. Williams*, 274 F.3d 1079, 1084 (6th Cir. 2001); *United States v. Williams*, 788 F.2d 1213, 1215 (6th Cir. 1986).

<sup>12</sup> *See* *United States v. Muhammad*, 502 F.3d 646, 652, 655 (7th Cir. 2007) (relying in part on *Reed*’s substantial contacts rule); *United States v. Cofield*, 11 F.3d 413, 417 (4th Cir. 1993) (same).

<sup>13</sup> *United States v. Bowens*, 224 F.3d 302, 312 (4th Cir. 2000) (“Our reasoning in *Cofield* . . . cannot be reconciled with the Supreme Court’s later decisions in *Cabrales* and *Rodriguez-Moreno*.”) (citing *United States v. Cabrales*, 524 U.S. 1 (1998); *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999)).

<sup>14</sup> *See* *United States v. Smith*, 641 F.3d 1200, 1208 (10th Cir. 2011).

<sup>15</sup> 748 F.3d 525, 536 (3d Cir. 2014).

<sup>16</sup> *Id.* at 530-31.

<sup>17</sup> *Id.* at 531.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

The Third Circuit reversed for lack of venue.<sup>21</sup> The venue of criminal trials “has been fundamental since our country’s founding,”<sup>22</sup> the court emphasized, and “cybercrimes do not happen in some metaphysical location that justifies disregarding constitutional limits on venue.”<sup>23</sup> The government invoked *Reed*’s substantial contacts test (which the Third Circuit had quoted with approval in a prior decision<sup>24</sup>) and pointed to the third factor enumerated in *Reed*—the locus of the effect of the criminal conduct—but the *Auernheimer* panel was not persuaded.<sup>25</sup> A crime’s effects can establish venue, it concluded, only in “situations in which ‘an essential conduct element is itself defined in terms of its effects.’”<sup>26</sup>

Although the defendant in *Auernheimer* was disappointed that the court did not reach his contention that his conduct was lawful,<sup>27</sup> procedure can be as important as substance.<sup>28</sup> By rejecting the government’s reliance on *Reed* to justify trying the defendant far from his home, in a place with no more connection to the alleged offenses than many other states, the Third Circuit reaffirmed a significant constitutional right and wisely gave short shrift to a test that would confer excessive power on prosecutors.

## SECTION I: THE TRADITIONAL APPROACH TO VENUE

### A. ORIGINS OF THE CONSTITUTION’S VENUE PROVISIONS

The venue provisions of the Constitution are linked to some of the significant events leading up to the American Revolution, including the June 1768 seizure of John Hancock’s sloop *Liberty* by customs officers in Boston.<sup>29</sup> The seizure occurred after a tidesman who had attended the ship when it had arrived in the city the preceding month changed his story and asserted that he had been held in a cabin while wine was surreptitiously unloaded.<sup>30</sup> When customs officers arranged for the *Liberty* to be towed out to the *Romney*, a British ship whose captain had recently angered Bostonians by forcibly enlisting seamen serving on inbound vessels,<sup>31</sup> a riot ensued.<sup>32</sup> British efforts to impose criminal penalties against the rioters came to naught, in part because grand jurors were selected through town meetings and radical colonists controlled the Boston Town Meeting and in part because no witnesses willing to testify against the rioters could be found.<sup>33</sup>

Parliament responded by turning its attention to a 1543 statute under which persons accused of treason “outside the realm” could be tried “before such commissioners, and in such shire of the realm, as shall be assigned by the King’s majesty’s commission.”<sup>34</sup> In January 1769, the House of Commons approved an address to the King recommending trial in England,

<sup>21</sup> *Id.* at 541.

<sup>22</sup> *Id.* at 532.

<sup>23</sup> *Id.* at 541.

<sup>24</sup> See *United States v. Goldberg*, 830 F.2d 459, 466 (3d Cir. 1987).

<sup>25</sup> *Auernheimer*, 748 F.3d at 536-37.

<sup>26</sup> *Id.* at 537 (quoting *United States v. Bowens*, 224 F.3d 302, 311 (4th Cir. 2000)).

<sup>27</sup> Emmett Rensin, *This Infamous Hacker Went to Prison for Trolling AT&T. Now He Wants to Troll Wall Street*, NEW REPUBLIC (Apr. 22, 2014), <http://www.newrepublic.com/article/117477/andrew-weev-auernheimers-tro-llc-could-send-him-back-prison>.

<sup>28</sup> See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting) (“[I]f put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices.”).

<sup>29</sup> Hiller B. Zobel, *THE BOSTON MASSACRE* 73 (1971).

<sup>30</sup> *Id.* at 74.

<sup>31</sup> *Id.* at 73-74.

<sup>32</sup> *Id.* at 75.

<sup>33</sup> *Id.* at 77.

<sup>34</sup> Treason Act, 1543, 35 Hen. 8, c. 2 (Eng.).

pursuant to the 1543 statute, of the persons most active in the commission of treason and misprision of treason in the Massachusetts Bay colony.<sup>35</sup>

When the legislature of Virginia received news of Parliament's action in May 1769, it promptly passed a resolution proclaiming that any trial for treason or misprision of treason committed in Virginia should be held in Virginia:

*Resolved . . .* that all Trials for Treason, Misprison of Treason, or for any Felony or Crime whatsoever, committed and done in this his Majesty's said Colony and Dominion, by any Person or Persons residing therein, ought of Right to be had, and conducted in and before his Majesty's Courts, held within the said Colony; . . . and that the seizing [of] any Person or Persons, residing in this Colony, [suspected] of any Crime whatsoever, committed therein; and sending such Person, or Persons, to Places beyond the Sea, to be tried, is highly derogatory of the Rights of British Subjects; as thereby the inestimable Privilege of being tried by a Jury from the Vicinage, as well as the Liberty of summoning and producing Witnesses on such Trial, will be taken away from the Party accused.<sup>36</sup>

Two months later, the lower house of the Massachusetts General Court similarly approved a resolution denouncing the prospective removal to England of colonists "suspected of any Crime whatsoever" committed in Massachusetts Bay.<sup>37</sup>

These resolutions did not cause Parliament to change course. In 1772, it enacted a statute providing that "[p]ersons charged with destroying "'in any place out of this realm' the King's dock yards, magazines, ships, ammunition," or supplies could be indicted "'either in any shire or county within this realm' or 'in such island, country, or place, where such offense shall have been actually committed.'"38

Royal authorities did not in fact try any colonists in England for alleged crimes committed in the colonies.<sup>39</sup> But Parliament's actions in 1769 and 1772 were not forgotten: In 1774 the Declaration and Resolves of the First Continental Congress proclaimed "[t]hat the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."<sup>40</sup> In 1776, the Declaration of Independence denounced King George III "[f]or transporting us beyond Seas to be tried for pretended [offenses]."<sup>41</sup>

<sup>35</sup> William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 62-64 (1944); Zobel, *supra* note 29, at 109. After the Boston Massacre in March 1770, Parliament also passed a law, American Rebellion Act, 1774, 14 Geo. III, c. 39, intending to protect British soldiers who were charged in Massachusetts with capital offenses on the basis of actions taken in suppressing riots or enforcing the revenue laws. See, Blume, *supra*; Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 807 (1976). If the governor concluded that "an indifferent trial" could not be held in Massachusetts, the defendant could be tried in England or another colony. Kershen, *supra*, at 807.

<sup>36</sup> JOURNAL OF THE HOUSE OF BURGESSES OF VIRGINIA, 1766-1769 (John Pendleton Kennedy ed., Virginia, 1906).

<sup>37</sup> Neil L. York, *Imperial Impotence: Treason in 1774 Massachusetts*, 29 LAW & HIST. REV. 657, 659 (2011).

<sup>38</sup> Blume, *supra* note 35, at 63 (quoting 12 Geo. III, c. 24 (1772)).

<sup>39</sup> See York, *supra* note 37, at 659.

<sup>40</sup> *Declaration and Resolves of the First Continental Congress, Oct. 14, 1774*, reprinted in *Documents Illustrative of the Formation of the Union of the American States* 3, 69th Cong., 1st Sess., H.R. Doc. No. 398 (1927).

<sup>41</sup> THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

In the original Constitution, Article III required that “[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.”<sup>42</sup> The anti-Federalists considered that provision inadequate.<sup>43</sup> Richard Henry Lee of Virginia had asked in October 1787: “What, then, becomes of the jury of the vicinage, or at least from the county, in the first instance—the states being from fifty to seven hundred miles in extent?”<sup>44</sup> In September 1789, James Madison introduced in the House of Representatives an amendment which provided that “[t]he trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites.”<sup>45</sup> The House passed that amendment with little change, but the Senate did not go along, apparently in part because of objections to the inclusion of a vicinage requirement.<sup>46</sup> A conference committee then produced the words later included in the Sixth Amendment: “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.”<sup>47</sup>

Thus, in lieu of incorporating into the Constitution the jury of the vicinage as it existed at common law, the Sixth Amendment tied venue to the large judicial districts being created by Congress.<sup>48</sup> Under the Judiciary Act of 1789, most districts were the size of an entire state.<sup>49</sup> The Act created thirteen judicial districts within the eleven states that by then had ratified the Constitution, with Massachusetts and Virginia each having two districts and the other states each having a single district.<sup>50</sup> Today there are ninety-four federal judicial districts.<sup>51</sup>

## B. CASE LAW BEFORE *REED*

At common law, offenses were understood (for jurisdictional purposes) to occur in one place, which in some instances was the place of the critical act or omission and in other instances was the place of the required result:

[T]he common law picked out one particular act (or omission) or result of the act (or omission) as vital for the determination of the place of commission (i.e. the situs) of each of the various crimes and gave jurisdiction to that state (and only that state) where the vital act or result occurred. Generally, it may be said that the situs of a crime at common law is the place of the act (or omission) if the crime is defined only in these terms, and the place of the result if the definition of the crime includes such a result.<sup>52</sup>

<sup>42</sup> U.S. CONST. art. III, § 2, cl. 3.

<sup>43</sup> See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 105 (1923).

<sup>44</sup> 1 JOHNATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 504 (2d. ed. 1836).

<sup>45</sup> 1 ANNALS OF CONG. 435 (1789) (Joseph Gales ed., 1834).

<sup>46</sup> See *Williams v. Florida*, 399 U.S. 78, 94-95 (1970).

<sup>47</sup> See *id.* at 95-96; U.S. CONST. amend. VI.

<sup>48</sup> See *Williams*, 399 U.S. at 96; Blume, *supra* note 35, at 66.

<sup>49</sup> Judiciary Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73.

<sup>50</sup> *Id.*

<sup>51</sup> See 28 U.S.C. §§ 81-131. Rule 18 of the Federal Rules of Criminal Procedure implements the Sixth Amendment by providing that “[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.”

<sup>52</sup> 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 4.4(a), at 295 (2d ed. 2003); see RESTATEMENT OF CONFLICT OF LAWS § 428 (1934).



It was established, for example, that "homicide is committed, not at the place from which the killer started the fatal force, but where it impinged upon the body of the victim,"<sup>53</sup> and that "robbery is committed where the property is taken from the victim and not where he was first seized, or where the property was subsequently taken."<sup>54</sup>

Prior to *Reed*, federal case law concerning venue in criminal cases was similar to the common law approach to jurisdiction in that venue generally was deemed proper only in a single district.<sup>55</sup> That was not so for so-called "continuing offenses," and it was not so for certain other offenses, but for most offenses, courts recognized only one permissible venue.<sup>56</sup> Case law generally distinguished between continuing offenses and offenses consisting of "a single act which occurs at one time and at one place in which only it may be tried, although preparation for its commission may take place elsewhere."<sup>57</sup> That "single act" might or might not be viewed as occurring where the defendant was physically located at the time of his criminal conduct.<sup>58</sup>

Thus, in *Burton v. United States*, the Supreme Court held that charges against a United States Senator of receiving compensation in a matter in which the United States was interested could not be brought in the Eastern District of Missouri, where the checks were paid by the drawee bank.<sup>59</sup> Each of the checks was received, indorsed, and deposited by the defendant in the District of Columbia.<sup>60</sup> A company in Saint Louis mailed the checks to him.<sup>61</sup> The bank where the checks were deposited gave the defendant immediate credit for the amounts involved.<sup>62</sup> The Court ruled that the offenses were committed in the District of Columbia, and that "[t]here was no beginning of the offense in Missouri."<sup>63</sup>

In *United States v. Lombardo*, a case decided during World War I, the Justices unanimously ruled that the District of Columbia was the proper venue for a charge of failure to comply with a provision of the Mann Act requiring anyone maintaining an alien woman for purposes of prostitution to file a statement containing specified information with the Commissioner General of Immigration, whose office was located in the District.<sup>64</sup> The Justices rejected the government's "conten[tion] that the offense was a continuing one" that extended from the Western District of Washington, where the defendant maintained the woman, to the District of Columbia.<sup>65</sup> No case had been cited, Justice McKenna explained, "which decides

---

<sup>53</sup> ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW ch. 1, § 3, at 40 (3d ed. 1982).

<sup>54</sup> *Id.* at 41 (footnote omitted).

<sup>55</sup> See *United States v. Salinas*, 373 F.3d 161, 164-66 (1st Cir. 2004). The venue for some federal offenses is governed by specific venue statutes: "If the statute under which the defendant is charged contains a specific venue provision, that provision must be honored (assuming, of course, that it satisfies the constitutional minima)." *Id.* at 164.

<sup>56</sup> *Id.* at 165.

<sup>57</sup> *United States v. Bozza*, 365 F.2d 206, 220 (2d Cir. 1966) (Friendly, J.) (quoting *Reass v. United States*, 99 F.2d 752, 754 (4th Cir. 1938)); see also *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1188 (2d Cir. 1989) ("When a crime consists of a single noncontinuing act, it is 'committed' in the district where the act is performed.").

<sup>58</sup> See, e.g., *United States v. Martin*, 704 F.2d 515, 516-18 & n.6 (11th Cir. 1983) (per curiam) (holding that offense of jumping bail can be prosecuted in the district in which bail was set and reserving question whether it can be prosecuted elsewhere); *United States v. Roche*, 611 F.2d 1180, 1183 & n.4 (6th Cir. 1980) (holding that offense of jumping bail can be prosecuted in the district in which bail was set and reserving question whether it can be prosecuted where the defendant was located when he jumped bail).

<sup>59</sup> 196 U.S. 283, 297-299 (1905).

<sup>60</sup> *Id.* at 296.

<sup>61</sup> *Id.* at 304.

<sup>62</sup> *Id.* at 297.

<sup>63</sup> *Id.* at 304.

<sup>64</sup> 241 U.S. 73, 74 (1916).

<sup>65</sup> See *id.* at 76.

that the requirement of a statute . . . that a paper shall be filed with a particular officer, is satisfied by a deposit in the post office at some distant place.”<sup>66</sup>

In a 1946 decision, *United States v. Anderson*, the Court ruled that the place where the defendant refused to take the oath of induction was the proper venue for a charge under the Selective Training and Service Act for refusal to submit to induction and that the charge could not be brought where the draft board that issued the order to report for induction was located.<sup>67</sup> Similarly, a decade later, a divided Court held in *Johnston v. United States* that when conscientious objectors were ordered by their local draft boards to report for civilian work at hospitals in other judicial districts, but failed to report for work as ordered, venue under the Sixth Amendment lay in the districts where the men were required to report.<sup>68</sup> The six-Justice majority relied on “the general rule that where the crime charged is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime.”<sup>69</sup>

The Court also viewed as a single-act offense the crime charged in another case decided by a 6-3 vote, *Travis v. United States*,<sup>70</sup> one of the high court’s many post-World War II decisions involving measures aimed at Communist subversion.<sup>71</sup> *Travis* concerned the proper venue for a charge against a union officer under the federal false statement statute, 18 U.S.C. § 1001, for an alleged falsehood in a “non-Communist” affidavit filed pursuant to the Taft-Hartley Act of 1947, which had amended the National Labor Relations Act of 1935.<sup>72</sup> The affidavit at issue, though executed in Colorado, was mailed to the National Labor Relations Board in Washington, D.C., where it was received and filed.<sup>73</sup> Speaking through Justice Douglas, the Court held that venue was improper in Colorado and that the prosecution should have been brought in Washington.<sup>74</sup> Justice Douglas pointed to the provision of the Taft-Hartley Act barring any Board investigation or issuance of a complaint in matters concerning a union ““unless there [was] on file with the Board’ a non-Communist affidavit of each union officer,” as well as the language in § 1001 (as it then existed) penalizing the making of a false statement “in any matter within the jurisdiction of any department or agency of the United States.”<sup>75</sup> Justice Harlan dissented and was joined by Justices Frankfurter and Clark.<sup>76</sup> In his

---

<sup>66</sup> *Id.* at 78.

<sup>67</sup> 328 U.S. 699, 704-06 (1946).

<sup>68</sup> 351 U.S. 215, 220 (1956).

<sup>69</sup> *Id.*

<sup>70</sup> 364 U.S. 631 (1961).

<sup>71</sup> *Travis* was one of the “roughly one hundred decisions in ‘Communist’ cases” decided by the Supreme Court from the October 1949 Term through the October 1961 Term. Robert M. Lichtman, *McCarthyism and the Court: The Need for “an Uncommon Portion of Fortitude in the Judges”*, 39 J. SUP. CT. HIST. 107, 108 (2014). Through the 1954 Term, the Court generally ruled for the government in “Communist” cases. *See id.* In the next two Terms, “it issued a number of decisions in favor of accused Communists that triggered harsh attacks upon the Court,” *id.*, as well as efforts in Congress, which very nearly succeeded, to curtail the Court’s jurisdiction. *See id.* at 120-22. In the 1957 Term, “outcomes were mixed.” *Id.* at 119. “In the 1958 Term, the government prevailed in two major First Amendment decisions, and in the 1959 Term it won every one of the handful of cases decided . . . [Justice] Frankfurter was now a consistent vote for the government and . . . the leader of a five-Justice conservative majority . . . in ‘Communist’ cases.” *Id.* at 122. The usual minority in such cases became Chief Justice Warren and Justices Black, Douglas, and Brennan. *See id.* at 119, 122-23. In the 1960 Term, during which *Travis* was decided, there were “fifteen signed decisions” in “Communist” cases. *Id.* at 123. “The government prevailed in nine (a tenth had a mixed result), every one over the dissenting votes of Black, Douglas, Warren, and Brennan.” *Id.* In *Travis*, that quartet again voted against the government, and this time they were joined by Justices Whitaker and Stewart to produce a six-Justice majority in the defendant’s favor. *See* 364 U.S. at 632, 637.

<sup>72</sup> *Travis*, 364 U.S. at 631, 632-33.

<sup>73</sup> *Id.* at 633.

<sup>74</sup> *Id.* at 636-37.

<sup>75</sup> *Id.* at 635.

<sup>76</sup> *Id.* at 637.

view, the offense charged began in Colorado and was completed in the District of Columbia and, under the continuing offense statute, could be prosecuted in either place.<sup>77</sup>

The traditional approach to venue sometimes did not yield clear answers. For example, charges of obstruction of justice under 18 U.S.C. § 1503<sup>78</sup> raised a difficult issue where the obstructive conduct occurred in one district and the proceeding that the defendant allegedly intended to influence was in another district. In a 1971 decision, *United States v. Swann*, the District of Columbia Circuit held that venue lay only in the district where the obstructive conduct occurred.<sup>79</sup> *Swann* was consistent with a 1951 decision of the Second Circuit, *United States v. Brothman*, a case involving two defendants indicted as a result of the same espionage investigation that later led to the trial, conviction, and execution of Julius and Ethel Rosenberg.<sup>80</sup>

Beginning in the 1970s, however, many federal courts of appeals chose not to follow *Swann* and *Brothman*. The first appellate court to reject those cases was the Sixth Circuit. In *United States v. O'Donnell*, the Sixth Circuit reasoned that "[u]nder Sec. 1503, the effect of corrupt conduct is always intended to occur only at one place: viz., the place or district in which the court sits or in which the proceeding is pending."<sup>81</sup> The Sixth Circuit also viewed § 1503 as "a codification of the court's power to punish contempts committed outside of its presence, albeit by criminal prosecution following indictment,"<sup>82</sup> and interpreted a 1941 Supreme Court decision as having "strongly implied . . . that such contempts are punishable by the court whose authority is challenged regardless of where the contemptuous acts may have occurred."<sup>83</sup> Between 1980 and 1987, the First, Fourth, and Eleventh Circuits followed the Sixth Circuit and held venue proper for a charge under § 1503 in the district of the relevant court or grand jury proceeding.<sup>84</sup> (In its 1985 decision in *Reed*, which is discussed in the next section, the Second Circuit reached the same result as those courts, but unlike them, it premised its decision on a new approach to venue.)<sup>85</sup> In 1988, Congress resolved the circuit split by providing that charges under § 1503 or under 18 U.S.C. § 1512, which prohibits tampering with witnesses, victims, or informants, may be prosecuted either in the district of the relevant court or grand jury proceeding, or in the district in which the conduct constituting the alleged offense occurred.<sup>86</sup>

Continuing offenses have long received special treatment for purposes of venue. In the Supreme Court's words,

---

<sup>77</sup> *Id.* at 637-41. Other cases illustrating the traditional understanding of the Constitution's venue provisions include *United States v. Anderson*, 328 U.S. 699, 704-06 (1946); *Burton v. United States*, 196 U.S. 283, 296-304 (1905); *United States v. Salinas*, 373 F.3d 161, 169 (1st Cir. 2004); *United States v. Bozza*, 365 F.2d 206, 220-21 (2d Cir. 1966); and *Reass v. United States*, 99 F.2d 752, 754-55 (4th Cir. 1938).

<sup>78</sup> 18 U.S.C. § 1503 (2012).

<sup>79</sup> 441 F.2d 1053, 1055 (D.C. Cir. 1971).

<sup>80</sup> 191 F.2d 70, 72-73 (2d Cir. 1951), *overruled by* *United States v. Reed*, 773 F.2d 477, 485 (2d Cir. 1985).

<sup>81</sup> 510 F.2d 1190, 1194 (6th Cir. 1975).

<sup>82</sup> *Id.* at 1195.

<sup>83</sup> *Id.* (discussing *Nye v. United States*, 313 U.S. 33 (1941)).

<sup>84</sup> *See* *United States v. Johnson*, 713 F.2d 654, 658-59 (11th Cir. 1983); *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, 904-06 (1st Cir. 1980). *See also* *United States v. Frederick*, 835 F.2d 1211, 1214 & n.10 (7th Cir. 1987) (holding that charge of witness tampering under 18 U.S.C. § 1512 could be brought in the district of the affected grand jury proceeding, rather than where the witness tampering occurred) (*overruling* *United States v. Nadolny*, 601 F.2d 940, 942-43 (7th Cir. 1979) (holding that charge under 18 U.S.C. § 1510 of obstructing a criminal investigation could only be brought where the alleged beating of the witness took place)).

<sup>85</sup> *Reed*, 773 F.2d at 486.

<sup>86</sup> 18 U.S.C. § 1512(i).

A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each.<sup>87</sup>

The federal code has contained a general venue provision for continuing offenses since 1867.<sup>88</sup> The original continuing offense statute provided that “[w]hen any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.”<sup>89</sup> So the law remained until the recodification of the federal criminal code in 1948.<sup>90</sup> The continuing offense statute enacted as part of that recodification (18 U.S.C. § 3237) contained one paragraph similar to the prior statute and a second paragraph aimed at crimes involving the mails or transportation in interstate or foreign commerce:

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.

Any offense involving the use of the mails, [or] transportation in interstate or foreign commerce, . . . 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, [or] mail matter moves.<sup>91</sup>

In 1958, these two paragraphs became 18 U.S.C. § 3237(a).<sup>92</sup> In 1984, Congress expanded the provision of § 3237(a) concerning transportation in interstate or foreign commerce to reach an offense involving “the importation of an object or person into the United States.”<sup>93</sup>

Courts applying the traditional approach to venue held that some offenses not classified as continuing offenses nevertheless could be prosecuted in more than one district where their elements implicated multiple districts. For example, the Fourth Circuit ruled in 1982 that a charge that a union representative received a payment of money from an employer, in violation of the Taft-Hartley Act, could be brought “either wherever commerce is affected”—the provision in question applies only to representatives of employees employed in an industry affecting commerce—“or wherever the proscribed act occurs.”<sup>94</sup>

<sup>87</sup> *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166 (1939) (quoting *Armour Pacing Co., v. United States*, 153 F. 1, 5-6 (8th Cir. 1907), *aff'd*, 209 U.S. 56 (1908)); *see* *Travis v. United States*, 364 U.S. 631, 634 (1961) (explaining a continuing offense “is held, for venue purposes, to have been committed wherever the wrongdoer roamed”); *United States v. Cores*, 356 U.S. 405, 408 (1958); *United States v. Johnson*, 323 U.S. 273, 275 (1944) (“By utilizing the doctrine of a continuing offense, Congress may . . . provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates.”); *United States v. Canal Barge Co.*, 631 F.3d 347, 351 (6th Cir. 2011).

<sup>88</sup> 18 U.S.C. § 3237 (1948) (originally enacted as Act of Mar. 2, 1867, ch. 169, § 30, 14 Stat. 484).

<sup>89</sup> *Id.*

<sup>90</sup> *See* 18 U.S.C. § 3237 (1948).

<sup>91</sup> 18 U.S.C. § 3237 (1948) (originally enacted at Act of June 25, 1923, ch. 645, § 3237, 62 Stat. 826).

<sup>92</sup> *See* Pub. L. No. 85-595, 72 Stat. 512 (1958).

<sup>93</sup> Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 1204, 98 Stat. 2152 (1984). The Second Circuit has held that the offense of mail fraud is not an “offense involving the use of the mails” within the meaning of § 3237(a). *United States v. Brennan*, 183 F.3d 139, 146 (2d Cir. 1999).

<sup>94</sup> *United States v. Billups*, 692 F.2d 320, 322-23, 333 (4th Cir. 1982).

## SECTION II: *REED*—THE SUBSTANTIAL CONTACTS TEST

In *United States v. Reed*, the Second Circuit embraced a novel approach to determining where venue is proper under the Constitution. The criminal charges in *Reed* arose from a civil case in which Thomas Reed and others had been sued for allegedly making illegal insider purchases of call options.<sup>95</sup> The civil case had been filed in the Southern District of New York, but Reed's deposition in the case had been taken in San Francisco.<sup>96</sup> Federal prosecutors later obtained an indictment in the Southern District of New York charging that at his deposition Reed (i) gave false testimony in violation of the false declarations statute, 18 U.S.C. § 1623, and (ii) obstructed justice in violation of 18 U.S.C. § 1503 by relying on handwritten notes that he passed off as contemporaneous but that in fact were created after the fact (in Virginia and California).<sup>97</sup> The indictment also charged securities and wire fraud.<sup>98</sup> The district court dismissed the § 1623 and obstruction of justice charges for improper venue,<sup>99</sup> but the Second Circuit reversed, in an opinion by Judge Ralph Winter.<sup>100</sup> The court adopted a new methodology and reversed as to both counts, thus requiring Reed to face charges in the Southern District of securities fraud, wire fraud, making a false declaration in violation of § 1623, and obstruction of justice.<sup>101</sup>

Noting that neither § 1623 nor the obstruction of justice statute contains a venue provision, Judge Winter noted that as to each count the court had to "determine 'the locality of the offense.'"<sup>102</sup> But he stressed that "an analytic flaw . . . has plagued analysis in this area."<sup>103</sup> Although "[b]oth courts and commentators have tended to construe the constitutional venue requirement as fixing a single proper situs for trial," Judge Winter reasoned that "where the acts constituting the crime and the nature of the crime charged implicate more than one location, the constitution does not command a single exclusive venue."<sup>104</sup> Rather, "[t]he constitution requires only that the venue chosen be determined from the nature of the crime charged as well as from the location of the act or acts constituting it, and that it not be contrary to an explicit policy underlying venue law."<sup>105</sup>

But having indicated that a policy underlying venue law may impose a limitation, Judge Winter then emphasized that "the precise policies to be furthered by venue law are not clearly defined."<sup>106</sup> "[F]airness to defendants cannot be the sole grounds for determining venue," he wrote, "because the most convenient venue for them may often have little, if any, connection with the crimes charged."<sup>107</sup> Judge Winter gave the example of "[a] foreign courier

<sup>95</sup> *United States v. Reed*, 773 F.2d 477, 478 (2d Cir. 1985).

<sup>96</sup> *Id.* at 478.

<sup>97</sup> *Id.* at 479. Although the *Reed* opinion refers to the § 1623 charge as a perjury charge, § 1623 was enacted as part of the Organized Crime Control Act of 1970 in order to relieve the government of some of the burdens associated with prosecutions for perjury as traditionally defined, specifically, the two-witness and direct evidence rules. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IV, § 401(a), 84 Stat. 932 (1970); H.R. REP. No. 91-1549, at 33 (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4008.

<sup>98</sup> *Reed*, 773 F.2d at 479.

<sup>99</sup> *Id.* at 479. When a defendant is indicted for more than one offense, venue must be proper with respect to each count. See, e.g., *United States v. Bozza*, 365 F.2d 206, 220-22 (2d Cir. 1966); *United States v. Davis*, 666 F.2d 195, 198-201 (5th Cir. Unit B 1982).

<sup>100</sup> Judges Meskill and Kearse joined the opinion.

<sup>101</sup> *Reed*, 773 F.2d at 482-87.

<sup>102</sup> *Id.* at 480 (quoting *Armour Packing Co. v. United States*, 209 U.S. 56, 76 (1908)).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

attempting to import illegal drugs through Kennedy Airport,” noting that such a defendant “will not find the Eastern District of New York particularly convenient.”<sup>108</sup>

Judge Winter concluded his re-examination of venue law by articulating this standard:

[T]here 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 — which we discuss *seriatim*.<sup>109</sup>

*Reed* implied that, to establish that venue is proper for a given charge, the government is not required to show that any particular one of the four factors identified supports venue, as long as another factor or factors sufficiently support venue. Since one of the factors is “the elements and nature of the crime,” the rule could be read to imply that venue can be proper even in a district where no element of the offense occurred.<sup>110</sup> Such a result would seemingly be contrary to the Supreme Court’s declaration that “[t]he constitutional specification is geographic; and the geography prescribed is the district or districts within which the offense is committed.”<sup>111</sup> In *Reed* itself, the Second Circuit did not have to confront that apparent contradiction because the venue that the government had chosen in that case—the Southern District of New York—was closely tied to an essential element of each of the charges at issue.<sup>112</sup> The § 1623 charge required that the false statement occur “in any proceeding before or ancillary to any court or grand jury of the United States.”<sup>113</sup> The proceeding relied upon by the government was the civil securities action, which was pending in the Southern District.<sup>114</sup> With respect to the obstruction of justice charge, the court, before deciding whether venue was proper, held that “the existence of an ongoing formal proceeding is an element of a § 1503 violation.”<sup>115</sup> The proceeding in question was pending in the Southern District, so again an essential element of the charge was directly linked to the venue selected by the government.

In discussing the § 1623 count, Judge Winter also reasoned (i) that “Reed’s testimony was inextricably bound to the Southern District” since the civil action in that district was the sole source of federal jurisdiction over the deposition, and the Southern District’s local rules applied to the deposition, and (ii) that “the locus of the intended effects of the alleged criminal conduct was in the Southern District of New York because the alleged perjury was intended to affect the outcome of an action pending there.”<sup>116</sup> Similarly, in addressing the obstruction of justice charge, Judge Winter stressed that “the source of federal jurisdiction and the locus of harm are in the district of the pending parent proceeding.”<sup>117</sup> Particularly by attributing significance to “the locus of the intended effects” in analyzing the § 1623 charge, Judge Winter illustrated that his new approach could significantly broaden the government’s choice of venue, for § 1623 imposes liability entirely without regard to whether the defendant intended

<sup>108</sup> *Id.* at 481.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *United States v. Anderson*, 328 U.S. 699, 704-05 (1946); *accord* *United States v. Cores*, 356 U.S. 405, 407 (1958) (“The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed.”).

<sup>112</sup> *Reed*, 773 U.S. at 483-86.

<sup>113</sup> *Id.* at 482.

<sup>114</sup> *Id.* at 478.

<sup>115</sup> *Id.* at 485.

<sup>116</sup> *Id.* at 483-84.

<sup>117</sup> *Id.* at 486.

to affect the court or grand jury proceeding in which the declaration was made.<sup>118</sup> If the intent to cause effects in a district could support venue in that district even if such intent is not required to establish guilt, the government's latitude in selecting a venue would be greatly increased.

*Reed* has elicited divergent reactions in the thirty years since it was decided. The Tenth Circuit has "decline[d] to adopt [*Reed*'s] 'substantial contacts' test,"<sup>119</sup> observing:

The Constitution and Rule 18 are clear: a crime must be prosecuted in the district *where it was committed*. It is true that in some cases a crime may be committed in multiple districts. . . . However, that a crime may be committed in multiple districts means only that venue may be proper in any district where the crime was committed—not that venue is proper in every district which has "substantial contacts" with the crime.<sup>120</sup>

The Sixth Circuit, however, has embraced *Reed*'s substantial contacts rule.<sup>121</sup> The Seventh Circuit has also looked to the rule for guidance.<sup>122</sup> The Fourth Circuit did at one time but has since questioned the decision in which it did so.<sup>123</sup> In the Second Circuit itself, *Reed*'s substantial contacts rule has received inconsistent treatment.<sup>124</sup> How the rule has fared in the Third Circuit is discussed in Part IV below.

### SECTION III: THE SUPREME COURT'S DECISIONS IN *CABRALES* AND *RODRIGUEZ-MORENO*

Two Supreme Court decisions in 1998 and 1999, after *Reed* but well before *Auernheimer*, contributed to the *Auernheimer* court's rejection of the government's argument that it should sustain venue on the basis of *Reed*'s substantial contacts test.

In the 1998 decision, *United States v. Cabrales*, the Supreme Court addressed the proper venue for two money laundering offenses that Congress had created in 1986:<sup>125</sup> (1) "conduct[ing] . . . a financial transaction" involving the proceeds of "specified unlawful activity" (a term defined by statute) "to avoid a transaction-reporting requirement" and (2) "engag[ing] . . . in a monetary transaction" in property that is worth more than \$10,000<sup>126</sup> and constitutes or is derived from proceeds of "specified unlawful activity."<sup>127</sup> The defendant allegedly had deposited \$40,000 in a bank in Florida and then made four separate withdrawals of \$9,500 from the bank.<sup>128</sup> The funds deposited and later withdrawn were traceable to unlawful sales of narcotics,<sup>129</sup> which fall within the statutory definition of "specified unlawful

<sup>118</sup> *Id.* at 484. *See, e.g.*, *United States v. Whimpy*, 531 F.2d 768, 770 (5th Cir. 1976) (stating the essential elements of a § 1623 offense are "(i) the declarant must be under oath, (ii) the testimony must be given in a proceeding before a court of the United States, (iii) the witness must knowingly make, (iv) a false statement, and (v) the testimony must be material to the proof of the crime").

<sup>119</sup> *United States v. Smith*, 641 F.3d 1200, 1208 (10th Cir. 2011).

<sup>120</sup> *Id.* (citations omitted).

<sup>121</sup> *See United States v. Zidell*, 323 F.3d 412, 423 (6th Cir. 2003); *United States v. Williams*, 274 F.3d 1079, 1084 (6th Cir. 2001); *United States v. Williams*, 788 F.2d 1213, 1215 (6th Cir. 1986) ("We now adopt the substantial contacts test as well as the rationale and framework of analysis articulated by the *Reed* court.").

<sup>122</sup> *See United States v. Muhammad*, 502 F.3d 646, 652, 655 (7th Cir. 2007).

<sup>123</sup> *See supra* note 13.

<sup>124</sup> *See* cases cited *supra* note 10.

<sup>125</sup> *United States v. Cabrales*, 524 U.S. 1, 3 (1998).

<sup>126</sup> *Id.*

<sup>127</sup> 18 U.S.C. § 1956(c)(7) (2012).

<sup>128</sup> *Cabrales*, 524 U.S. at 4.

<sup>129</sup> *Id.*

activity.”<sup>130</sup> The sales took place in Missouri.<sup>131</sup> The charges (both of which alleged substantive offenses<sup>132</sup>) were brought in the Western District of Missouri.<sup>133</sup> The Supreme Court unanimously ruled that venue was improper.<sup>134</sup>

Quoting *Anderson*, the Justices adhered to the principle that “[T]he *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it.”<sup>135</sup> But for the unlawful sales in Missouri, the Florida transactions would have been lawful. The Court nevertheless ruled that the Western District of Missouri was an improper venue because “the Government indicted Cabrales ‘for transactions which began, continued, and were completed only in Florida.’”<sup>136</sup> Although the government had “urg[ed] the efficiency of trying Cabrales in Missouri, because evidence in that State, and not in Florida, shows that the money Cabrales allegedly laundered derived from unlawful activity,” the Court was not persuaded.<sup>137</sup>

A year later, the Justices decided *United States v. Rodriguez-Moreno*.<sup>138</sup> Like the charges in *Cabrales*, the charge in *Rodriguez-Moreno* required proof of underlying unlawful activity.<sup>139</sup> But unlike the charges in *Cabrales*, the charge in *Rodriguez-Moreno* required proof that *the defendant* was criminally responsible for the underlying activity.<sup>140</sup> Whereas the occurrence in Missouri of “specified unlawful activity” for which the defendant in *Cabrales* was *not* criminally responsible did make venue proper in Missouri for charges based on conduct in Florida,<sup>141</sup> the Court ruled in *Rodriguez-Moreno* that *the defendant’s* commission of a crime (kidnapping) that occurred in part in New Jersey supported venue in New Jersey as to a firearms charge based on conduct in Maryland because the defendant’s involvement in the kidnapping was a predicate for the firearms charge.<sup>142</sup>

The charges in *Rodriguez-Moreno* arose, as the Court explained, from events that began with “a drug transaction that took place in Houston, Texas,” in which “a New York drug dealer stole 30 kilograms of a Texas drug distributor’s cocaine.”<sup>143</sup> The distributor hired Rodriguez-Moreno and others to search for the drug dealer and to hold the middleman captive while doing so.<sup>144</sup> Rodriguez-Moreno and his collaborators took the middleman from Texas to New Jersey and then to Maryland, where Rodriguez-Moreno put a .357 magnum revolver to the back of the middleman’s neck but did not fire.<sup>145</sup> Federal prosecutors in New Jersey secured an indictment against Rodriguez-Moreno that not only charged conspiracy to kidnap and kidnapping, but also charged carrying a firearm in relation to the kidnapping in violation of 18 U.S.C. § 924(c)(1).<sup>146</sup> Rodriguez-Moreno challenged venue on the firearm charge,

<sup>130</sup> See 18 U.S.C. § 1956(c)(7)(a).

<sup>131</sup> *Cabrales*, 524 U.S. at 4.

<sup>132</sup> Cabrales was also charged with conspiracy, but that charge was not before the high court. See *id.* at 4-5.

<sup>133</sup> *Id.* at 4.

<sup>134</sup> *Id.* at 3-4.

<sup>135</sup> *Id.* at 6-7 (quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946)).

<sup>136</sup> *Id.* at 8 (quoting *United States v. Cabrales*, 109 F.3d 471, 472 (8th Cir. 1997), *amended by* 115 F.3d 621 (1997)).

<sup>137</sup> *Id.* at 9-10.

<sup>138</sup> *United States v. Rodriguez-Moreno* 526 U.S. 275 (1999).

<sup>139</sup> *Id.* at 280.

<sup>140</sup> *Id.*

<sup>141</sup> *Cabrales*, 524 U.S. at 8.

<sup>142</sup> *Rodriguez-Moreno*, 526 U.S. at 281.

<sup>143</sup> *Id.* at 276.

<sup>144</sup> *Id.* at 276-77.

<sup>145</sup> *Id.* at 277.

<sup>146</sup> *Id.*



pointing out that his use of a gun occurred in Maryland.<sup>147</sup> The Justices ruled that venue on the firearm charge was nonetheless proper in New Jersey.<sup>148</sup>

The Court reiterated that 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."<sup>149</sup> The Court added this explanation: "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*."<sup>150</sup>

The Court went on to point out that the court of appeals had "overlooked an essential conduct element of the § 924(c)(1) offense."<sup>151</sup> Section 924(c)(1), the Court explained, "prohibits using or carrying a firearm 'during and in relation to any crime of violence . . . for which [a defendant] may be prosecuted in a court of the United States.'"<sup>152</sup> The Court "interpret[ed] § 924(c)(1) to contain two distinct *conduct elements*—as is relevant to this case, the 'using and carrying' of a gun and the commission of a kidnaping."<sup>153</sup> Because the conduct satisfying one of those two elements occurred in part in Jersey, venue was proper in New Jersey.<sup>154</sup> In explaining why that result was consistent with *Cabrales*, the Court distinguished "circumstance elements" from "conduct elements":

As we interpreted the laundering statutes at issue [in *Cabrales*], they did not proscribe "the anterior criminal conduct that yielded the funds allegedly laundered." The existence of criminally generated proceeds 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."<sup>155</sup>

"It does not matter," the Court added, "that [defendant] used the .357 magnum revolver . . . only in Maryland because he did so 'during and in relation to' a kidnaping that was begun in Texas and continued in New York, New Jersey, and Maryland. . . . Where venue is appropriate for the underlying crime of violence, so too it is for the § 924(c)(1) offense."<sup>156</sup> The Court expressed no opinion regarding the government's contention that the effects of a defendant's conduct in a district can establish venue in that district.<sup>157</sup>

*Cabrales* and *Rodriguez-Moreno* reflect a focus on the elements of the offense in the determination of venue. *Rodriguez-Moreno* suggests, moreover, that although "conduct elements" can support venue, "circumstance elements" cannot.

---

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 282.

<sup>149</sup> *Id.* at 279 (bracketed material in original) (quoting *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998) (quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946))) (quotation marks omitted).

<sup>150</sup> *Id.* (emphasis added).

<sup>151</sup> *Id.* at 280.

<sup>152</sup> *Id.* (alteration in original).

<sup>153</sup> *Id.* (emphasis added).

<sup>154</sup> *Id.* at 282.

<sup>155</sup> *Id.* at 280 n.4 (citations omitted) (quoting *United States v. Cabrales*, 524 U. S. 1, 7 (1998)). Justice Scalia, joined by Justice Stevens, dissented. Stressing that § 924(c)(1) "prohibits the act of using or carrying a firearm 'during' (and in relation to) a predicate offense," Justice Scalia reasoned that "we need only ask where the defendant's alleged act of using a firearm during (and in relation to) a kidnaping occurred. Since it occurred only in Maryland, venue will lie only there." *Id.* at 283 (Scalia, J., dissenting).

<sup>156</sup> *Id.* at 281-82 (majority opinion).

<sup>157</sup> *Id.* at 279 n.2.

SECTION IV: THE THIRD CIRCUIT'S DECISION IN *AUERNHEIMER*

The charges in *United States v. Auernheimer* that the Third Circuit ultimately held were brought in the wrong venue concerned events following Apple Computer's introduction of the iPad portable tablet computer in January 2010.<sup>158</sup> Apple entered into an exclusive contract with AT&T to provide iPad users with a cellular connection to the Internet, if they preferred such a connection to a wireless Internet, or "wifi," connection.<sup>159</sup> This cellular service offered to iPad users was known as "3G" service and was available through an account with AT&T.<sup>160</sup> With a user ID and a password, a user could access his or her AT&T account through a website created by AT&T.<sup>161</sup> A user's user ID was his or her e-mail address.<sup>162</sup>

To make access to these accounts easier, AT&T programmed its website so that when an iPad user communicated with the website, AT&T's servers searched for that iPad user's Integrated Circuit Card Identifier ("ICC-ID"), "the unique nineteen- or twenty-digit number that identifies an iPad's Subscriber Identity Module, commonly known as a SIM Card."<sup>163</sup> If the user had registered his or her account with AT&T, AT&T's servers automatically inserted the e-mail address associated with the user's ICC-ID in the e-mail part of the login prompt on AT&T's website.<sup>164</sup>

The AT&T website attracted the interest of Daniel Spitler, a member of Goatse Security, a loosely affiliated group of eight programmers who searched for security holes.<sup>165</sup> When Spitler visited the AT&T website to sign up for service using a network card he had purchased, he entered the ICC-ID of his iPad.<sup>166</sup> He noticed that his e-mail address appeared on the AT&T login page.<sup>167</sup> He guessed that AT&T servers had derived his e-mail address from his ICC-ID.<sup>168</sup> Spitler tested his hypothesis by changing the ICC-ID in the URL by one digit; when he did so, he discovered that a different e-mail address appeared on the login page.<sup>169</sup>

Spitler then wrote a computer program that he dubbed an "account slurper" to automate this process.<sup>170</sup> The program would visit the AT&T website again and again, each time using a different ICC-ID.<sup>171</sup> "If an email address appeared in the login box, the program would save that email address to a file under Spitler's control."<sup>172</sup> After Spitler shared what he had learned with Andrew Auernheimer, who was also a member of Goatse Security, Auernheimer helped him improve the program.<sup>173</sup> Over a four-day period, the program collected 114,000 e-mail addresses.<sup>174</sup>

<sup>158</sup> *United States v. Auernheimer*, 748 F.3d 525, 529 (3d Cir. 2014).

<sup>159</sup> See Appellant's Opening Brief at 7, *Auernheimer*, 748 F.3d 525 (3d Cir. 2014) (No. 13-1816).

<sup>160</sup> *Auernheimer*, 748 F.3d at 529.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 529-30.

<sup>164</sup> *Id.* at 530.

<sup>165</sup> *Id.*; see also Indictment, *Auernheimer*, 748 F.3d 525 (3d Cir. 2014) (No. 11-470).

<sup>166</sup> *Auernheimer*, 748 F.3d at 530.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 530-31.

<sup>171</sup> *Id.* at 531.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

Auernheimer e-mailed various members of the media to publicize what he and Spitler had been able to do.<sup>175</sup> Some of the persons whom Auernheimer contacted communicated with AT&T, which immediately repaired the defect.<sup>176</sup> Ryan Tate, a reporter for the online publication *Gawker*, expressed interest in writing a story.<sup>177</sup> Auernheimer explained to Tate how the e-mail addresses had been collected and sent him a list of the addresses.<sup>178</sup> *Gawker* soon ran a story by Tate entitled "Apple's Worst Security Breach: 114,000 iPad Owners Exposed," which discussed how the e-mail addresses had been obtained.<sup>179</sup> Tate's story identified some of the people whose e-mail addresses had been obtained but disclosed "only redacted images of a few email addresses and ICC-IDs."<sup>180</sup>

Spitler lived and worked in California.<sup>181</sup> Auernheimer lived and worked in Arkansas.<sup>182</sup> The servers accessed by the program were located in Texas and Georgia.<sup>183</sup> The *Gawker* reporter, Tate, was also located outside New Jersey.<sup>184</sup>

Other than the fact that approximately 4,500 of the e-mail addresses at issue belonged to New Jersey residents,<sup>185</sup> Auernheimer's actions had no particular connection to New Jersey. Nevertheless, AT&T, which had had its headquarters in New Jersey from 1992 to 2009, was able to convince the United States Attorney's Office for the District of New Jersey to pursue charges against Spitler and Auernheimer.<sup>186</sup> On January 18, 2011, the FBI arrested Auernheimer at his home in Fayetteville, Arkansas.<sup>187</sup> He was transported across the country to Newark, New Jersey and detained until he was released on \$50,000 bond.<sup>188</sup>

In June 2011, the government secured Spitler's agreement to plead guilty to a two-count information.<sup>189</sup> The first count charged him with conspiring in violation of 18 U.S.C. § 371 to violate 18 U.S.C. § 1030(a)(2)(C), a provision of the Computer Fraud and Abuse Act ("CFAA") that makes it a crime to "intentionally access[ ] a computer without authorization or exceed[ ] authorized access, and thereby obtain[ ] . . . information from any protected computer."<sup>190</sup> The second count charged Spitler with fraud in connection with personal information in violation of 18 U.S.C. § 1028(a)(7), the so-called identity fraud statute.<sup>191</sup>

---

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 540; Elinor Mills, *Hacker in AT&T-iPad Security Case Arrested on Drug Charges*, CNET (June 15, 2010), <http://www.cnet.com/news/hacker-in-at-t-ipad-security-case-arrested-on-drug-charges/>.

<sup>188</sup> *Auernheimer*, 748 F.3d at 540; *Man Accused of "Brute Force" iPad Hack Freed From Federal Custody*, THE SMOKING GUN (February 28, 2011), <http://www.thesmokinggun.com/buster/hacking/man-accused-brute-force-ipad-hack-freed-federal-custody-02283201>.

<sup>189</sup> Letter from Assistant United States Attorney Zach Intrater to Susan Cassell, Esq., June 22, 2011, *United States v. Spitler*, Case 2:11-cr-429-SDW (filed June 23, 2011), ECF No. 29.

<sup>190</sup> *Id.*; 18 U.S.C. § 1030 (2015).

<sup>191</sup> Jonathan Stempel, *Daniel Spitler Pleads Guilty to iPad Hack, Email Address Theft*, REUTERS (June 23, 2011), available at [http://www.huffingtonpost.com/2011/06/23/daniel-spitler-ipad-hack-email-address-theft\\_n\\_883240.html](http://www.huffingtonpost.com/2011/06/23/daniel-spitler-ipad-hack-email-address-theft_n_883240.html); 18 U.S.C. § 1028 (2015).

In July 2011, after Auernheimer refused to plead guilty, the government obtained an indictment charging him with the same two offenses.<sup>192</sup> In August 2012, the government obtained a superseding indictment against Auernheimer that increased the charge in the conspiracy count from a misdemeanor to a felony by adding the allegation that the conduct was in furtherance of a violation of New Jersey's computer crime statute.<sup>193</sup>

Auernheimer moved to dismiss the indictment for lack of venue, but the district court denied the motion.<sup>194</sup> It found venue on the CFAA charge proper under the continuing offense statute because Auernheimer's "purported conduct—knowing disclosure of personal identifying information to the press—affected thousands of New Jersey residents and violated New Jersey law."<sup>195</sup> Venue was also likely proper on the identity fraud charged, the court ruled, because the predicate "unlawful activity" alleged in the identity fraud charge was the CFAA violation alleged in the first count, and the court had already ruled that venue was proper on the first count.<sup>196</sup>

At trial, the court refused to instruct the jury on venue, holding that the government had established venue as a matter of law and that there was no genuine issue of material fact.<sup>197</sup> Auernheimer was found guilty on both counts, sentenced to 41 months in prison, and immediately remanded to custody.<sup>198</sup> He appealed, raising both substantive challenges and a challenge to venue.<sup>199</sup>

In an opinion by Judge Michael Chagares, the Third Circuit reversed the conviction on both counts.<sup>200</sup> Noting that the case "raises a number of complex and novel issues that are of great public importance in our increasingly interconnected age," the court deemed it "necessary to reach only one that has been fundamental since our country's founding: venue. The proper place of colonial trials was so important to the founding generation that it was listed as a grievance in the Declaration of Independence."<sup>201</sup>

Observing that "[v]enue should be narrowly construed,"<sup>202</sup> Judge Chagares rejected the government's reliance on *Reed*'s substantial contacts rule for three reasons. First, although the Third Circuit had quoted the rule with approval in a 1987 decision, *United States v. Goldberg*,<sup>203</sup> Judge Chagares expressed doubt that the Third Circuit had embraced the substantial contacts rule:

It is far from clear that this Court has ever "adopted" this test. We have mentioned it only once. The test was cited in a long block quote to *Reed*, and then analyzed in a single sentence. The *Goldberg* panel did not need to rely on the locus of the effects of the defendant's conduct in that case because all of his acts took place in the district in which he was tried. No panel of this

<sup>192</sup> See Appellant's Opening Brief at 5, *Auernheimer*, 748 F.3d 525 (3d Cir. 2014) (No. 13-1816).

<sup>193</sup> *Id.*; *United States v. Auernheimer*, No. 11-CR-470, 2012 WL 5389142, at \*4-5 (D.N.J. Oct. 26, 2012); N.J. STAT. ANN. § 2C:20-31(a) (West 2003).

<sup>194</sup> *United States v. Auernheimer*, No. 11-CR-470, 2012 WL 5389142, at \*1 (D.N.J. Oct. 26, 2012).

<sup>195</sup> *Id.* at \*4-5.

<sup>196</sup> *Id.* at \*5.

<sup>197</sup> *United States v. Auernheimer*, 748 F.3d 525, 532 (3d Cir. 2014).

<sup>198</sup> *Id.*; Andrew 'weev' Auernheimer sentenced to 41 months for exploiting AT&T iPad security flaw, *THE VERGE* (Mar. 18, 2013), <http://www.theverge.com/2013/3/18/4118484/andrew-weev-auernheimer-sentenced-att-ipad-hack>.

<sup>199</sup> *Auernheimer*, 748 F.3d at 529.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 532.

<sup>202</sup> *Id.* at 532-33.

<sup>203</sup> 830 F.2d 459, 466 (3d Cir. 1987).

Court has ever cited *Goldberg*, or any other case, for this test since — either before, or especially after, the Supreme Court clarified the venue inquiry in *Cabrales* and *Rodriguez-Moreno*.<sup>204</sup>

Second, Judge Chagares interpreted post-*Reed* decisions in the Second Circuit as establishing that the substantial contacts rule “operates to limit venue, not to expand it,”<sup>205</sup> i.e., as “serv[ing] to limit venue in instances where the *locus delicti* constitutionally allows for a given venue, but trying the case there is somehow prejudicial or unfair to the defendant.”<sup>206</sup> Finally, Judge Chagares stressed that “[t]he Government argues only that it has minimally satisfied one of the four prongs of the [substantial contacts] test — the ‘locus of the effect of the criminal conduct.’”<sup>207</sup> “The Government has not cited,” he explained, “and we have not found, any case where the locus of the effects, standing by itself, was sufficient to confer constitutionally sound venue.”<sup>208</sup> A crime’s effects are relevant to venue, Judge Chagares added, only in “situations in which ‘an essential conduct element is itself defined in terms of its effects.’”<sup>209</sup> He gave the example of “a prosecution for Hobbs Act robbery,” in which “venue may be proper in any district where commerce is affected because the terms of the act themselves forbid affecting commerce.”<sup>210</sup>

Rather than analyze venue under *Reed*’s substantial contacts rule, the Third Circuit looked to the Supreme Court’s decisions in *Cabrales* and *Rodriguez-Moreno*.<sup>211</sup> Emphasizing the need “to separate ‘essential conduct elements’ from ‘circumstance element[s],” the Third Circuit explained that “[o]nly ‘essential conduct elements’ can provide the basis for venue; ‘circumstance elements’ cannot.”<sup>212</sup> The court pointed to the Supreme Court’s observation in *Rodriguez-Moreno*, with reference to its earlier decision in *Cabrales*, that the existence of criminally generated proceeds had only been a “circumstance element” of the money laundering offense charged in *Cabrales* and that therefore the fact that the laundered proceeds were generated by illegal narcotics sales in Missouri did not establish venue in Missouri.<sup>213</sup> Turning to the case before it, the Third Circuit held that venue was improper as to the conspiracy count because “neither Auernheimer nor his co-conspirator Spitler performed any ‘essential conduct element’ of the underlying CFAA violation or any overt act in furtherance of the conspiracy in New Jersey.”<sup>214</sup> Similarly, venue was improper on the identity fraud charge because “Auernheimer did not commit any essential conduct of the identity fraud charge in New Jersey.”<sup>215</sup>

## SECTION V: THE PURPOSES SERVED BY THE CONSTITUTION’S VENUE PROVISIONS

*Auernheimer* is a sound and welcome reaffirmation of the vitality of the constitutional restrictions on the venue of criminal prosecutions and rejection of the government’s attempt to use *Reed*’s substantial contacts test to loosen those restrictions. The decision is also useful in clarifying that, although venue was sustained in *Rodriguez-Moreno*, the distinction the

<sup>204</sup> *Auernheimer*, 748 F.3d at 536 (citations omitted).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 537.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* (quoting *United States v. Bowens*, 224 F.3d 302, 311 (4th Cir. 2000)).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 533.

<sup>212</sup> *Id.* (quoting *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 & n.4 (1999); *Bowens*, 224 F.3d at 310).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 535.

<sup>215</sup> *Id.* at 536.

Supreme Court drew between conduct elements and circumstance elements tends to support a restrictive approach to venue.

In *Reed*, the Second Circuit seemed to question whether the constitutional provisions governing venue truly serve important purposes. The court observed that “the precise policies to be furthered by venue law are not clearly defined,” and that “the Supreme Court has yet to articulate a coherent definition of the underlying policies.”<sup>216</sup> Later, a district judge in the same circuit, Judge Edward Korman of the Eastern District of New York, went further, characterizing the Sixth Amendment’s venue provision as “a relic of a bygone era when jurors decided cases on the basis of personal knowledge.”<sup>217</sup>

The venue provisions of the Constitution do serve significant purposes. In the words of Judge (as he then was) Samuel Alito, those provisions “were adopted to achieve important substantive ends—primarily, to deter governmental abuses of power.”<sup>218</sup>

#### **A. PROXIMITY TO THE DEFENDANT’S RESIDENCE AND RESOURCES, AND TO PERSONS WHO KNOW HIS OR HER CHARACTER**

The vast majority of the time, the district where the crime allegedly occurred is the district where the defendant resides. Although the Supreme Court has deemed “erroneous” the notion that “criminal defendants have a constitutionally based right to a trial in their home districts,”<sup>219</sup> it has also recognized—in the words of Justice Frankfurter in *United States v. Johnson*—that allowing the government a broad choice of venue may expose the defendant to “the unfairness and hardship [of] trial in an environment alien” to him and “remote from home and from appropriate facilities for defense.”<sup>220</sup> Similarly, referring to the right to a jury drawn from the state and district where the crime was committed, Justice Story observed:

The object . . . is to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighbourhood; and thus to be subjected to the verdict of mere strangers, who may feel no 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.<sup>221</sup>

Concurring in *Johnson*, Justice Murphy underscored the importance of character witnesses and their greater availability and greater likely impact in the district where the defendant resides:

<sup>216</sup> *United States v. Reed*, 773 F.2d 477, 480 (2d Cir. 1985).

<sup>217</sup> *United States v. Hart-Williams*, 967 F. Supp. 73, 79 (E.D.N.Y. 1997), *aff’d on other grounds*, 129 F.3d 115 (Table), 1997 WL 701374 (2d Cir. Nov. 10, 1997). *See also* *United States v. Saavedra*, 223 F.3d 85, 94-95 (2d Cir. 2000) (Cabranes, J., dissenting) (“In its opinion today, the majority suggests that [the Venue Clause of the Sixth Amendment] is somehow of diminished importance ‘in today’s wired world of telecommunications and technology.’”).

<sup>218</sup> *United States v. Palma-Ruedas*, 121 F.3d 841, 861 (3d Cir. 1997) (Alito, J., concurring in part & dissenting in part).

<sup>219</sup> *Platt v. Minn. Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964).

<sup>220</sup> 323 U.S. 273, 275 (1944); *see also* *United States v. Cores*, 356 U.S. 405, 407 (1958) (“The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place.”); *Hyde v. Shine*, 199 U.S. 62, 78 (1905) (“To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship, to which he ought not to be subjected if the case can be tried in a court of his own jurisdiction.”); *United States v. Clark*, 728 F.3d 622, 625 (7th Cir. 2013) (rejecting challenge to venue in part because defendant did not suggest that government’s choice of venue will create ‘needless hardship’ (quoting *Johnson*, 323 U.S. at 275)).

<sup>221</sup> JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1775 (Carolina Academic Press 1987) (1833).

Very often the difference between liberty and imprisonment in cases where the direct evidence offered by the government and the defendant is evenly balanced depends upon the presence of character witnesses. The defendant is more likely to obtain their presence in the district of his residence, which in this instance is usually the place where the prohibited article is mailed. The inconvenience, expense and loss of time involved in transplanting these witnesses to testify in trials far removed from their homes are often too great to warrant their use. Moreover, they are likely to lose much of their effectiveness before a distant jury that knows nothing of their reputations.<sup>222</sup>

## B. ACCESS TO EVIDENCE

Fact witnesses, documents, and other evidence are more likely to be found in the district where the crime was committed than elsewhere. In Justice Story's words, "trial in a distant state or territory might subject the party . . . to the inability of procuring proper witnesses to establish his innocence."<sup>223</sup>

## C. JUROR VALUES AND EXPERIENCE

The right to be tried in the district in which the alleged offense was committed is also important because of the jury's role in, as Judge Learned Hand put it, "tempering [the] rigor" of the law "by the mollifying influence of current ethical conventions."<sup>224</sup> As six judges of the Second Circuit recognized in a recent opinion, the Sixth Amendment, "by defining the community from which a federal jury must be drawn, permits the jury to operate as the conscience of that community in judging criminal cases."<sup>225</sup> The Supreme Court, too, has

<sup>222</sup> *Johnson*, 323 U.S. at 279.

<sup>223</sup> *Palma-Ruedas*, 121 F.3d at 861-62 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1775 (Carolina Academic Press 1987) (1833)); see *Travis v. United States*, 364 U.S. 631, 640 (1961) (Harlan, J., joined by Frankfurter & Clark, JJ., dissenting) ("[P]rosecution in the district in which the affidavit was executed, most often I would suppose the place where the union offices are located, is more likely to respect the basic policy of the Sixth Amendment than would a prosecution in the district where the affidavit was filed. The witnesses and relevant circumstances surrounding the contested issues in such cases more probably will be found in the district of the execution of the affidavit than at the place of filing."); *Clark*, 728 F.3d at 625 (rejecting venue challenge in part because defendant "has not argued that trial in the Southern District of Illinois will subject him to 'oppressive expenses, or . . . to the inability of procuring proper witnesses to establish his innocence.'" (quoting *Palma-Ruedas*, 121 F.3d at 861-62 (Alito, J., concurring in part & dissenting in part) (quoting Story, *supra*, § 1775))); *Nadolny*, 601 F.2d at 943 ("When venue is laid in the proper district the one in which the crime was committed witnesses are more readily available, and the operative facts and situs of the incident are closer at hand."), *overruled on other grounds*, *United States v. Frederick*, 835 F.2d 1211, 1214, 1215 n.11 (7th Cir. 1987); see also *United States v. Posner*, 549 F. Supp. 475, 478 (S.D.N.Y. 1982) (granting motion to transfer prosecution for tax evasion involving charitable donations of land in Miami from Southern District of New York to Southern District of Florida in part because a view of the land involved would be possible in Florida but not in New York).

<sup>224</sup> *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir. 1942), *rev'd on other grounds*, 317 U.S. 269 at 281; see *United States v. Dougherty*, 473 F.2d 1113, 1131-32 (D.C. Cir. 1972) ("Human frailty being what it is, a prosecutor disposed by unworthy motives could likely establish some basis in fact for bringing charges against anyone he wants to book, but the jury system operates in fact, so that the jury will not convict when they empathize with the defendant, as when the offense is one they see themselves as likely to commit, or consider generally acceptable or condonable under the mores of the community." (cross-reference omitted)).

<sup>225</sup> *United States v. Fell*, 571 F.3d 264, 269 (2d Cir. 2009) (Raggi, J., joined by Jacobs, C.J. & Cabranes, Parker, Wesley & Livingston, JJ., concurring in denial of rehearing *en banc*); see also *id.* at 284 (Calabresi, J., dissenting) ("The Framers found the *local* nature of a jury, and *local values* embodied in that jury, to be so important that they made it a constitutional requirement that juries in *federal* cases be not only 'impartial' but 'of the State and district wherein the crime shall have been committed.'" (quoting U.S. CONST. amend. VI)); *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.15 (1968) ("one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death in a capital case] is to maintain a link between contemporary community values and the penal system").

observed that “the jury trial provisions in the Federal and State Constitutions reflect . . . insistence upon community participation in the determination of guilt or innocence.”<sup>226</sup> The ethical conventions and values that a jury can contribute to the system of justice ordinarily should be those of a jury drawn from the region in which the alleged offense was committed.<sup>227</sup> What persons in one part of the country might consider unethical might be deemed acceptable in another region.

#### D. AVOIDING FORUM-SHOPPING BY THE GOVERNMENT

Finally, as Justice Frankfurter also observed in *Johnson*, granting the prosecution a broad choice of venue “leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution.”<sup>228</sup> It encourages forum-shopping, which is objectionable in matters involving enforcement of the criminal law<sup>229</sup> just as it is in ordinary civil cases,<sup>230</sup> cases involving alleged “enemy combatants,”<sup>231</sup> and cases involving aliens seeking to avoid deportation.<sup>232</sup>

Affording prosecutors a wide choice of permissible venues has become especially problematic in recent decades as Congress has created an enormous number of new federal crimes. In 1983, the Office of Legal Policy of the United States Department of Justice reviewed the United States Code page by page and counted approximately 3,000 federal

<sup>226</sup> *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); *see also* *R.R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873) (“It is assumed that twelve men know more of the common affairs of life than does one man.”); *Lawlor v. N. Am. Corp. of Ill.*, 949 N.E.2d 155, 176 (Ill. App. 2011) (“Juries have the unique ability to articulate community values.” (quotation marks omitted)); *Johnson v. United States*, 613 A.2d 888, 901 (D.C. 1992) (“[Jurors’] collective experiences and judgments are particularly adept in achieving justice”).

<sup>227</sup> Particularly in prosecutions of alleged white collar crime, guilt or innocence may turn on the application of extremely malleable standards. For example, in cases involving alleged mail or wire fraud offenses, juries are sometimes instructed that “[a] scheme or artifice to defraud may describe a departure from fundamental honesty, moral uprightness, or fair play and candid business dealings in the general life of the community.” *United States v. Frost*, 125 F.3d 346, 371 (6th Cir. 1997) (quoting jury instructions). The unfairness of putting a citizen’s liberty at stake based on standards such as this, in a forum far from where the conduct at issue occurred, is apparent.

<sup>228</sup> *United States v. Johnson*, 323 U.S. 273, 275 (1944); *see also* *Travis*, 364 U.S. at 634 (“[V]enue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of ‘a tribunal favorable’ to it.” (quoting *Johnson*, 323 U.S. at 275)); *Clark*, 728 F.3d at 625 (rejecting challenge to venue in part because defendant did not suggest that prosecution will cause “the ‘appearance of abuses . . . in the selection of what may be deemed a tribunal favorable to the prosecution’” (quoting *Johnson*, 323 U.S. at 275)); *United States v. Salinas*, 373 F.3d 161, 164 (1st Cir. 2004) (stating that the Constitution provides “a safety net, which ensures that a criminal defendant cannot be tried in a distant, remote, or unfriendly forum solely at the prosecutor’s whim. Seen in this light, it is readily apparent that venue requirements promote both fairness and public confidence in the criminal justice system.” (quoting *Johnson*, 323 U.S. at 276)).

<sup>229</sup> *See, e.g.*, *United States v. Poole*, 531 F.3d 263, 273 (4th Cir. 2008); *United States v. Bagnell*, 679 F.2d 826, 831 (11th Cir. 1982); *United States v. Peraino*, 645 F.2d 548, 553 (6th Cir. 1981); *Jones v. Oklahoma*, 481 P.2d 169, 171-72 (Okla. Crim. App. 1971); *cf. State v. Simpson*, 551 So. 2d 1303, 1304 (La. 1989) (per curiam) (“To meet due process requirements, capital and other felony cases must be [assigned] . . . on a random or rotating basis or under some other procedure adopted by the court which does not vest the district attorney with power to choose the judge to whom a particular case is assigned.”); *People v. Preciado*, 144 Cal. Rptr. 102, 104 (Cal. Ct. App. 1978) (“The plea bargain in this case was improper; the district attorney had no authority to promise that a particular judge would impose sentence. The ‘promise’ to a defendant that a particular judge will handle any particular matter in the future is improper. This type of arrangement encourages ‘judge-shopping,’ an evil that should be prevented.” (footnote omitted)).

<sup>230</sup> *See, e.g.*, *Walker v. Armco Steel Corp.*, 446 U.S. 740, 745 (1980); *Butner v. United States*, 440 U.S. 48, 55 (1979); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938).

<sup>231</sup> *See, e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426, 428, 447 (2004) (“Whenever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent and file the petition in the district of confinement. . . . This rule, derived from the terms of the habeas statute, serves the important purpose of preventing forum shopping by habeas petitioners.”).

<sup>232</sup> *See, e.g.*, *Vasquez v. Reno*, 233 F.3d 688, 694 (1st Cir. 2000).



crimes.<sup>233</sup> By 2007, the number of federal crimes had increased by nearly fifty percent to "at least 4,450."<sup>234</sup>

One result of this expansion of federal crimes is that federal prosecutors often can bring charges under many statutes on the basis of a single course of conduct:

Given the breadth and variety of the federal criminal code, it is likely that a defendant's behavior will potentially violate a multitude of overlapping criminal statutes, especially where white-collar crime is involved. The same course of fraudulent conduct, for example, might constitute mail fraud (if the mails have been used to carry part of it out); wire fraud (if a telephone or the internet was used as part of the execution of the scheme); securities fraud under Title 18 (if the fraud was related to securities); securities fraud under Title 15 (if the fraud was in connection with the purchase or sale of securities); false statements to an agency of the government (if an agency, including the SEC, was one of the "victims" of the fraud) under Title 18; and false statements to the SEC under Title 15. If two defendants are involved, a conspiracy charge can likely be added.<sup>235</sup>

The "morass of . . . overlapping statutes"<sup>236</sup> available to federal prosecutors makes it easier for them to obtain a conviction on at least one count even if the defendant is innocent of wrongdoing. "[W]here the prosecution's evidence is weak," Justice Stevens has observed, "its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict."<sup>237</sup> In the words of defense attorney John Cline,

[M]any federal prosecutors take advantage of overlapping federal criminal offenses to charge the same course of conduct under two, or three, or more different statutes or regulations. Instead of a one-count indictment charged under a single statute, the jury might have ten or twenty or a hundred counts charged under several different statutes. The result is often jury compromise. Jurors cannot agree unanimously whether the defendant is guilty, so, as a compromise, they convict on some counts and acquit on others.<sup>238</sup>

<sup>233</sup> Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 CRIM. L.F. 99, 110 (1989).

<sup>234</sup> John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, 26 Legal Memorandum 1 (June 16, 2008), available at [www.heritage.org/Research/LegalIssues/lm26.cfm](http://www.heritage.org/Research/LegalIssues/lm26.cfm).

<sup>235</sup> Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN. ST. L. REV. 1107, 1120 (2005) (footnotes omitted). Professor Seigel was a federal prosecutor for nine years, first as an organized crime prosecutor in Philadelphia and then as First Assistant U.S. Attorney in Tampa. *Id.* at 1107 n.1. Judge Harold Greene similarly observed that "[a]s a consequence of the proliferation of criminal laws that has occurred in recent years, almost any criminal act can today be prosecuted, at the option of the prosecutor, on the basis of a great many different charges, from an entire menu of substantive offenses, to various conspiracy counts, aiding and abetting, and any number of enhancements." *United States v. Roberts*, 726 F. Supp. 1359, 1363 (D.D.C. 1989), *rev'd on other grounds sub nom.* *United States v. Doe*, 934 F.2d 353 (D.C. Cir. 1991).

<sup>236</sup> *Hearing Before the Over-Criminalization Task Force of 2014, H. Comm. on the Judiciary*, 113th Cong. 47 (2014) (written statement of John D. Cline, Esq.); *see also id.* ("[T]here are more than two dozen different false statement statutes in Chapter 47 of Title 18; there are seven different fraud statutes in Chapter 63 of Title 18; and I count nineteen different obstruction offenses in Chapter 73 of Title 18.")

<sup>237</sup> *Ball v. United States*, 470 U.S. 856, 868 (1985) (Stevens, J., concurring) (quoting *Missouri v. Hunter*, 459 U.S. 359, 372 (1983) (Marshall, J., joined by Stevens, J., dissenting)).

<sup>238</sup> *Hearing Before the Over-Criminalization Task Force of 2014, supra* note 239, at 47. *United States v. Natale*, 719 F.3d 719 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1875 (2014), is an example of a recent case in which prosecutors apparently gained an advantage by charging the same course of conduct in multiple counts. Natale, a vascular surgeon, was alleged to have operated on ordinary aortic aneurysms that two of his patients suffered from but billed for

Broadening the government's choice of venue by applying *Reed*'s substantial contacts test would only exacerbate the problem described by Cline since it would maximize the number of charges the government could bring in a single prosecution. If the traditional approach of determining where the offense was committed means that sometimes the government cannot join all charges in a single prosecution, so be it. Given the proliferation of federal offenses, the government will typically be able to obtain an indictment that contains an ample number of counts even if has to omit some offenses committed in another district. In *Reed* itself, the charges that the court considered were charges *in addition to* the charges of securities fraud and wire fraud for which venue was concededly proper in the Southern District of New York.<sup>239</sup>

## SECTION VI: CONCLUSION

Thirty-five years ago, in an opinion by Judge James Hunter III, the Third Circuit declared that “[t]hrough our nation has changed in ways which it is difficult to imagine that the Framers of the Constitution could have foreseen, the rights of criminal defendants which they sought to protect in the venue provisions of the Constitution are neither outdated nor outmoded.”<sup>240</sup> The same observation would be equally apt today. The *Reed* court may have been correct that the Supreme Court's explication of the policies underlying those provisions has left something to be desired, but a citizen's right to be tried in the district where the alleged offense was committed continues to protect important interests.

---

operations on *renal* artery aneurysms—which are typically more difficult procedures and are reimbursed by Medicare at a higher rate—and written operative notes to make it appear he had performed the more difficult type of operation. *See id.* at 722, 724-25. As to each operation, the indictment charged both health care fraud in violation of 18 U.S.C. § 1347 and the making of a false statement in a matter involving a health care benefit program in violation of 18 U.S.C. § 1035. Indictment at 1, 5, 12-14, 17-20, *Natale*, 719 F.3d 719 (No. 11CR594). As to one of the operations, the indictment also charged mail fraud. *Id.* at 15-16. *Natale* was acquitted on the charges of health care fraud and mail fraud but found guilty on the two false statement charges. *Natale*, 719 F.3d at 728.

<sup>239</sup> *United States v. Reed*, 773 F.2d 477, 479 (2d Cir. 1985).

<sup>240</sup> *United States v. Passodelis*, 615 F.2d 975, 977 (3d Cir. 1980).



